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KERAJAAN MALAYSIA v. SEMANTAN ESTATES (1952) SDN BHD

FEDERAL COURT, PUTRAJAYA
AHMAD MAAROP PCA
RAMLY ALI FCJ
B AZAHAR MOHAMED FCJ
AZIAH ALI FCJ
PRASAD SANDOSHAM ABRAHAM FCJ
[CIVIL APPLICATION NO: 08(f)-607-11-2016(W)]
22 NOVEMBER 2018

C

JURISDICTION: *Federal Court – Inherent jurisdiction – Application for review against dismissal of application for leave to appeal – Whether applicant deprived of opportunity to have appeal argued on merits – Whether case fell within limited grounds and very exceptional circumstances – Whether inherent powers could be*
D *invoked to review own decision on merits – Whether applicant exhausted other remedies – Whether application could be used as further avenue of appeal – Whether acceptable reason given for delay in application – Whether sufficient grounds raised to justify review – Courts of Judicature Act 1964, s. 96 – Rules of the Federal Court 1995, r. 137*

E This case had a rather long history consisting of events and a number of court actions which took place as far back as the year 1956. The respondent ('plaintiff') was the registered owner and in possession of the entire 700 acres 3 roods of land originally held under CT 12530, part of which was required for a public purpose and accordingly, on 5 November 1956, the plaintiff
F received a notice stating that the Government intended to take possession of 225 acres under ss. 9(i), (iv) and 10(i) of the Land Acquisition Enactment (Cap 140) ('Enactment'). Following an enquiry, the Collector made an award of compensation to the plaintiff at the rate of RM5,282 per acre for 250 acres ('award') even though the area gazetted to be acquired was only the 225 acres
G and took possession of the 250 acres. The plaintiff received the award of RM1,320,500 under protest as to the sufficiency of the amount and thereafter notified the Collector, *inter alia*, that they did not accept the award, and that they required the Collector to refer the matter to court under s. 22(1) of the Enactment. By a subsequent gazette notification, the Selangor State Government declared the withdrawal of an area of land measuring 22 acres
H 1 rood 24 poles ('22 acres') from the acquisition. Later, it was declared that an area of land measuring 60 acres was additionally needed for public purpose. Although the 60 acres were stated as part of the land held under CT 12530, by this time CT 12530 had been cancelled and two new titles, namely, CT 17037 and CT 17038 were issued. The 60 acres was part of CT
I 17038. Possession of the 60 acres was taken by the Collector without holding

an enquiry or paying any compensation. The Collector, in a subsequent letter, admitted that the award was invalid and that the enquiry of 27 November 1956 as a whole was a nullity and informed the plaintiff that notices under ss. 9(i), (iii), (iv) and 10(i) of the Enactment stating that the Government intended to take possession the 202 acres and the enquiry for the acquisition of the 202 acres was scheduled to be held on 18 June 1958. The 202 acres, by that time, was part of CT 17038. However, the enquiry was postponed and was eventually abandoned. The area which the Government finally took possession of from the plaintiff was the 263.272 acres. By a letter dated 1 August 1958, the plaintiff agreed that all procedural matters be settled, provided the Government confirmed the agreement. On 29 May 1959, a reference ('Semantan 1') was made to the High Court in respect of the purported acquisition of the 263.272 acres under s. 22 of the Enactment. However, the action was dismissed. On 18 February 1963, the Ruler-in-Council granted the 263.272 acres to the Federal Lands Commissioner, 38 separate titles were issued and the Registrar of Titles purported to register the grants in the name of the Federal Lands Commissioner pursuant to s. 56 of the Land Code (Cap 138). The plaintiff, by an *ex-parte* originating motion applied for leave to apply for an order of *mandamus* directed at the Collector of Land Revenue Wilayah Persekutuan requiring him to complete the acquisition proceedings in accordance with the provisions of the Acquisition Act by holding an enquiry and determining the amount of compensation to be paid to the plaintiff in respect of the acquisition of the 263.272 acres. The leave sought was granted and therefore, the plaintiff, by notice of originating motion ('Semantan 2'), applied for an order of *mandamus*. However, the originating motion was struck out on the ground that the action was barred by s. 2(a) of the Public Authorities Protection Act 1948 ('PAPA'). Aggrieved, on 28 February 1986, the plaintiff appealed to the Supreme Court but the appeal was dismissed on grounds, *inter alia*, that: (i) an application for an order of *mandamus* is a 'suit, action or proceeding' within the meaning of s. 2 of the PAPA and therefore, the application for an order of *mandamus* was time barred; and (ii) *mandamus* will not be issued where there is an alternative remedy available. The plaintiff had an alternative remedy available to it, *ie*, an appeal from the decision in Semantan 1. Thereafter, the Land Administrator wrote a letter to the plaintiff enclosing Borang L to surrender the title deed to the land held under CT 17038. On 2 March 1989, the plaintiff filed writ of summons ('Semantan 3') against the applicant ('defendant') for trespass. However, the application was struck out. Dissatisfied, the plaintiff appealed and on 3 October 1994, the Federal Court allowed the plaintiff's appeal ('the 1994 FC's decision').

A B C D E F G H I

The 1994 FC's decision revived the plaintiff's trespass action in Semantan 3, the subject matter of the current review. The matter was heard by the High Court, and in allowing the plaintiff's claim, the High Court held, *inter alia*, that the defendant had not taken the 263.272 acres of land from the plaintiff lawfully. The defendant's appeal to the Court of Appeal ('CA') against the decision was dismissed and therefore, the defendant sought leave to appeal to the FC. However, the FC dismissed the defendant's application and hence, the application by the defendant under r. 137 of the Rules of the Federal Court 1995 ('r. 137') to review and set aside the decision. The defendant also applied, amongst others, for: (i) the application for leave be reheard; and (ii) stay of any proceeding pursuant to the decision of this court. The reasons upon which the application was based were, *inter alia*: (i) the defendant had been denied the opportunity to be heard in an appeal and this had resulted in gross injustice; (ii) the decision of the CA in Semantan 3 had very serious legal implication on the process of land acquisition, the position of the defendant as the registered owner of the land and its occupation and also had serious financial implication on the defendant; and (iii) the decision of the court that the defendant had taken possession of the land unlawfully had very serious financial implication on the defendant. The defendant thus contended this was an appropriate case to warrant the court to exercise its inherent jurisdiction to review its earlier decision and that the defendant had no further recourse on merits of the case consequent to the dismissal of the leave application by the earlier panel of the court. On the other hand, the plaintiff submitted that the review application was without merit, *inter alia*, because: (i) there had been a four-year delay between the decision and the review application; (ii) the defendant had not made out any circumstances which would allow review of the FC decision under r. 137; (iii) by the application, the defendant sought to relitigate and challenge the decisions of the court; (iv) the fact that the defendant had failed in its fully argued leave application did not give the defendant grounds to file an application for review under r. 137 and if allowed, would open the floodgates for a review of every failed application under s. 96 of the Courts of Judicature Act 1964 ('CJA'); and (v) the legal and financial implications in the decision of the CA could not be the basis to review the final decision of the apex court and the legal and financial implications were the natural consequences of the wrongful actions of the defendant.

Held (dismissing application with costs)
Per Ahmad Maarop PCA delivering the judgment of the court:

(1) To exercise its inherent power under r. 137 to review its own decision, the court must be satisfied that it is a case that falls within the limited grounds and very exceptional circumstances. The inherent powers of this court under r. 137 cannot be invoked to review its own decision on its merits. The review of the decision of the leave panel was not sought

on any of the limited grounds and exceptional circumstances explained in *Asean Security Papers Mills Sdn Bhd v. Mitsui Sumimoto Insurance (Malaysia) Bhd*. The issues raised by the defendant had been raised, litigated and decided in Semantan 1, Semantan 2 and Semantan 3. None of the grounds raised by the defendant was sufficient to justify a review under r. 137. (paras 51, 53, 80 & 81)

(2) Whilst it was true that the plaintiff had received the compensation under protest, it was not correct to say that the acquisition was never challenged on its legality. The pleaded case of the plaintiff was that the defendant had taken possession of the land wrongfully on the grounds which included non-compliance, by the Collector in the acquisition exercise, of the relevant provisions under the Enactment and the admission by the Collector that the enquiry held and the award made therein were null and void. The facts and circumstances relating to these had already been raised, argued and dealt with by the courts in Semantan 3. (para 81)

(3) It was the defendant's contention that the defendant was deprived of the opportunity to have its appeal argued on merits in the FC, and that the defendant had no other alternative remedy when the court did not grant leave. However, the possible remedy for the defendant was to appeal and the leave to appeal must be obtained under s. 96 of the CJA after having fulfilled the threshold requirement provided under s. 96. Even if the points of law framed by the defendant fell within the ambit of the section, it had to show a *prima facie* case of success. The leave panel of the FC must have decided that the judgment or order of the CA made in Semantan 3 did not involve a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the FC would be to public advantage. In other words, the defendant failed to fulfil the threshold requirement under s. 96(a) of the CJA. Therefore, r. 137 could not be used as a further avenue of appeal. (paras 82, 83 & 85)

(4) This court could not consider the order of the leave panel as though the court was sitting in judgment in an appeal from that decision, as it was not for this court to consider whether the leave panel had interpreted or applied the law correctly or not. That was a matter of opinion. No leave should be given where the leave panel's decision is challenged on its merits, whether on facts or in law. Even if this court was of the view that an important piece of evidence had not been given sufficient weight, or even if the court did not agree with the interpretation or application of certain provision of the law, there was no sufficient reason to set aside the decision of the leave panel. Disagreement with the leave panel was not a ground that warranted a review of the decision as otherwise, there would be no end to a proceeding. Furthermore, nothing was shown by the defendant that it had a *prima facie* chance of success. (para 85)

(5) It was submitted for the defendant that the issue of delay would be insignificant where there were cogent reasons demonstrated for a review of a decision and it was argued that since a blatant injustice had been caused, the delay ought not to hinder the exercise of the inherent jurisdiction. The explanation given for the delay did not constitute an acceptable reason. Hence, this was not an appropriate case to exercise the court's inherent power to review and set aside the decision of the leave panel. The application for review, therefore, failed. (paras 87, 90 & 91)

Bahasa Malaysia *Headnotes*

Kes ini mempunyai sejarah lama melibatkan peristiwa dan beberapa tindakan mahkamah yang berlaku semenjak tahun 1956. Responden ('plaintif') adalah pemilik berdaftar dan memiliki keseluruhan 700 ekar dan 3 rud tanah yang asalnya dipegang bawah CT 12530, sebahagiannya diperlukan untuk tujuan awam dan untuk itu, pada 5 November 1956, plaintif menerima notis menyatakan bahawa Kerajaan berhasrat mengambil milikan 225 ekar tanah bawah ss. 9(i), (iv) dan 10(i) Enakmen Pengambilan Tanah (Bab 140) ('Enakmen'). Berikutan siasatan, Pemungut memberikan award pampasan kepada plaintif pada kadar RM5,282 seekar untuk 250 ekar ('award') walaupun kawasan yang diwartakan untuk diambil hanya 225 ekar dan mengambil milikan 250 ekar. Plaintif menerima award berjumlah RM1,320,500 dengan bantahan berkenaan kecukupan jumlah tersebut dan kemudian memaklumkan Pemungut, antara lain, bahawa mereka tidak menerima award tersebut, dan bahawa mereka meminta Pemungut merujuk perkara tersebut kepada mahkamah bawah s. 22(1) Enakmen. Melalui notis warta selepas itu, Kerajaan Negeri Selangor mengisytiharkan penarikan balik kawasan tanah berukuran 22 ekar 1 rud dan 24 pol ('22 ekar') daripada pengambilan tersebut. Kemudian, diisytiharkan bahawa kawasan tanah berukuran 60 ekar diperlukan sebagai tambahan untuk tujuan awam. Walaupun 60 ekar itu dinyatakan sebahagian tanah yang dipegang bawah CT 12530, pada masa itu, CT 12530 telah dibatalkan dan dua hak milik baru, iaitu, CT 17037 dan CT 17038 dikeluarkan. Kawasan 60 ekar itu ialah sebahagian CT 17038. Milikan 60 ekar diambil oleh Pemungut tanpa membuat siasatan atau membayar apa-apa pampasan. Pemungut, dalam surat terkemudian, mengakui bahawa award tersebut tidak sah dan bahawa siasatan pada 27 November 1956 keseluruhannya batal dan memaklumkan plaintif bahawa notis bawah ss. 9(i), (iii), (iv) dan 10(i) Enakmen yang menyatakan Kerajaan berhasrat untuk mengambil milikan 202 ekar tanah dan siasatan untuk pengambilan 202 ekar itu dijadualkan akan dijalankan pada 18 Jun 1958. Kawasan 202 ekar, pada masa itu, adalah sebahagian CT 17038. Walau bagaimanapun, siasatan tersebut ditunda dan kemudian diabaikan. Kawasan yang akhirnya diambil oleh Kerajaan daripada plaintif

ialah 263.272 ekar. Melalui surat bertarikh 1 Ogos 1958, plaintif bersetuju bahawa kesemua perkara prosedur akan diselesaikan, jika Kerajaan mengesahkan perjanjian tersebut. Pada 29 Mei 1959, satu rujukan ('Semantan 1') dibuat ke Mahkamah Tinggi berkaitan pengambilan 263.272 ekar bawah s. 22 Enakmen. Walau bagaimanapun, tindakan tersebut ditolak. Pada 18 Februari 1963, Raja dalam Mesyuarat memberikan 263.272 ekar tanah itu kepada Pesuruhjaya Tanah Persekutuan, 38 hak milik berasingan dikeluarkan dan Pendaftar Hak Milik mendaftarkan geran-geran tersebut atas nama Pesuruhjaya Tanah Persekutuan menurut s. 56 Kanun Tanah (Bab 138). Plaintif, melalui satu usul pemula *ex-parte*, memohon kebenaran untuk memohon perintah *mandamus* yang ditujukan terhadap Pemungut Hasil Tanah Wilayah Persekutuan yang memerlukan beliau melengkapkan prosiding pengambilan menurut peruntukan-peruntukan Akta Pengambilan dengan menjalankan siasatan dan menentukan jumlah pampasan untuk dibayar kepada plaintif berkaitan dengan pengambilan 263.272 ekar tersebut. Kebenaran yang dipohon diberikan dan dengan itu, plaintif, melalui notis usul ('Semantan 2'), memohon perintah *mandamus*. Walau bagaimanapun, notis usul itu dibatalkan atas alasan bahawa tindakan tersebut terbatas oleh had masa menurut s. 2(a) Akta Perlindungan Pihak Berkuasa Awam 1948 ('PAPA'). Terkilan, pada 28 Februari 1986, plaintif merayu ke Mahkamah Agung tetapi rayuannya ditolak atas alasan, antara lain, bahawa (i) permohonan untuk perintah *mandamus* adalah 'guaman, tindakan atau prosiding' dalam maksud s. 2 PAPA dan oleh itu, permohonan untuk perintah *mandamus* terbatas oleh had masa; dan (ii) *mandamus* tidak boleh diberikan apabila terdapat remedi alternatif. Plaintif mempunyai remedi alternatif, iaitu, rayuan daripada keputusan Semantan 1. Kemudian, Pentadbir Tanah menulis surat kepada plaintif dengan melampirkan Borang L untuk menyerahkan surat ikatan hak milik tanah yang dipegang bawah CT 17038. Pada 2 Mac 1989, plaintif memfailkan writ saman ('Semantan 3') terhadap pemohon ('defendan') untuk pencerobohan. Walau bagaimanapun, permohonan itu dibatalkan. Tidak berpuas hati, plaintif merayu dan pada 3 Oktober 1994, Mahkamah Persekutuan membenarkan rayuan perayu ('keputusan MP 1994').

Keputusan MP 1994 menghidupkan semula tindakan pencerobohan plaintif dalam Semantan 3, perkara semakan di sini. Perkara tersebut didengar Mahkamah Tinggi, dan dalam membenarkan tuntutan plaintif, Mahkamah Tinggi memutuskan, antara lain, defendan mengambil 263.272 ekar tanah itu daripada plaintif secara tidak sah. Rayuan defendan ke Mahkamah Rayuan ('MR') terhadap keputusan itu ditolak dan oleh itu, defendan memohon kebenaran merayu ke MP. Walau bagaimanapun, MP menolak permohonan defendan dan dengan itu, permohonan defendan bawah k. 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 ('k. 137') untuk menyemak

dan mengetepikan keputusan tersebut. Defendan juga memohon, antara lain, untuk: (i) permohonan kebenaran didengar semula; dan (ii) penangguhan apa-apa prosiding menurut keputusan mahkamah ini. Alasan-alasan yang menjadi asas permohonan adalah, antara lain: (i) defendan dinafikan peluang untuk didengar dalam rayuan dan ini mengakibatkan ketidakadilan melampau; (ii) keputusan MR dalam Semantan 3 mengandungi implikasi undang-undang yang serius dalam proses pengambilan tanah, kedudukan defendan sebagai pemilik berdaftar tanah dan pendudukannya dan juga menyebabkan implikasi kewangan yang serius pada defendan; dan (iii) keputusan mahkamah bahawa defendan mengambil milikan tanah secara tidak sah mempunyai implikasi kewangan yang serius pada defendan. Oleh itu, defendan menghujahkan bahawa ini adalah kes yang sesuai untuk mewajarkan mahkamah melaksanakan bidang kuasa sedia ada untuk menyemak keputusannya sebelum ini dan defendan tiada cara lanjut atas merit kes berikutan penolakan permohonan kebenaran oleh panel mahkamah sebelum ini. Sebaliknya, plaintif menghujahkan, permohonan semakan tidak bermerit, antara lain, kerana: (i) terdapat kelewatan empat tahun antara keputusan dan permohonan semakan; (ii) defendan tidak membuktikan apa-apa hal keadaan yang membenarkan semakan keputusan MP bawah k. 137; (iii) melalui permohonan ini, defendan memohon litigasi semula dan mencabar keputusan mahkamah; (iv) fakta bahawa defendan gagal dalam permohonan kebenaran yang dihujahkan sepenuhnya tidak memberikan defendan alasan untuk memfailkan permohonan untuk menyemak bawah k. 137 dan jika dibenarkan, akan mengundang kebanjiran semakan setiap permohonan yang gagal bawah s. 96 Akta Mahkamah Kehakiman 1964 ('AMK'); dan (v) implikasi undang-undang dan kewangan dalam keputusan MR tidak boleh menjadi asas semakan keputusan akhir mahkamah tertinggi dan implikasi undang-undang dan kewangan adalah akibat semulajadi tindakan salah defendan.

Diputuskan (menolak permohonan dengan kos)
Oleh Ahmad Maarop PMR menyampaikan penghakiman mahkamah:

(1) Untuk melaksanakan kuasa sedia ada bawah k. 137 untuk menyemak keputusannya sendiri, mahkamah mesti berpuas hati bahawa kes tersebut terangkum dalam alasan-alasan terhad dan hal keadaan istimewa. Kuasa sedia ada mahkamah ini bawah k. 137 tidak boleh dibangkitkan untuk menyemak keputusan bermeritnya sendiri. Semakan keputusan panel kebenaran tidak dipohon atas mana-mana alasan terhad dan hal keadaan istimewa yang dijelaskan dalam *Asean Security Papers Mills Sdn Bhd v. Mitsui Sumimoto Insurance (Malaysia) Bhd*. Isu-isu yang dibangkitkan defendan telah dibangkitkan, dibicarakan dan diputuskan dalam Semantan 1, Semantan 2 dan Semantan 3. Tiada satu pun alasan yang dibangkitkan oleh defendan mencukupi untuk mewajarkan semakan bawah k. 137.

(2) Walaupun benar bahawa plaintif menerima pampasan dengan bantahan, tidak benar untuk menyatakan bahawa pengambilan itu tidak pernah dicabar atas kesahannya. Kes plaintif yang diplidkan adalah defendan telah mengambil milikan tanah secara salah atas alasan-alasan yang termasuk ketidakpatuhan, oleh Pemungut dalam pelaksanaan pengambilan, peruntukan-peruntukan relevan bawah Enakmen dan pengakuan oleh Pemungut bahawa siasatan yang diadakan dan award yang dibuat menurutnya, batal dan tidak sah. Fakta-fakta dan hal keadaan berkaitan dengan perkara tersebut telah ditimbulkan, dihujahkan dan ditangani oleh mahkamah-mahkamah dalam Semantan 3.

(3) Defendan menghujahkan bahawa defendan dinafikan peluang untuk menghujahkan rayuannya atas merit di MP, dan bahawa defendan tiada remedi alternatif apabila mahkamah tidak memberikan kebenaran. Walau bagaimanapun, remedi yang mungkin untuk defendan ialah rayuan dan kebenaran untuk merayu perlu diperoleh bawah s. 96 AMK selepas keperluan ambang batas yang diperuntukkan bawah s. 96 dipenuhi. Walaupun alasan undang-undang dirangka defendan terangkum dalam seksyen tersebut, defendan perlu menunjukkan kes *prima facie* defendan akan berjaya. Panel kebenaran MP telah memutuskan bahawa penghakiman atau perintah MR dalam Semantan 3 tidak melibatkan persoalan prinsip umum yang diputuskan buat pertama kali atau soalan penting di mana hujahan lanjut dan keputusan MP akan memberi faedah kepada awam. Dalam erti kata lain, defendan gagal memenuhi keperluan ambang batas bawah s. 96(a) AMK. Oleh itu, k. 137 tidak boleh diguna pakai sebagai alasan lanjut untuk merayu.

(4) Mahkamah ini tidak boleh mempertimbangkan perintah panel kebenaran seakan-akan mahkamah bersidang dalam penghakiman dalam rayuan daripada keputusan itu, kerana mahkamah ini tidak boleh mempertimbangkan sama ada panel kebenaran mentafsirkan atau mengaplikasi undang-undang dengan betul atau tidak. Itu bermaksud memberi pendapat. Kebenaran tidak wajar diberikan apabila keputusan panel kebenaran dicabar atas meritnya, sama ada atas fakta-fakta atau undang-undang. Walaupun mahkamah ini berpendapat secebis keterangan penting tidak diberikan penekanan yang mencukupi, atau jika mahkamah ini tidak menyetujui pentafsiran atau penggunaan peruntukan undang-undang tertentu, tiada alasan mencukupi untuk mengetepikan keputusan panel kebenaran. Tiada persetujuan dengan panel kebenaran bukan alasan mewajarkan semakan keputusan tersebut kerana, jika dibenarkan, prosiding tidak akan berakhir. Tambahan lagi, tiada apa-apa ditunjukkan oleh defendan bahawa defendan mempunyai peluang *prima facie* akan berjaya.

(5) Dihujahkan bagi pihak defendan bahawa isu kelewatan tidak penting apabila terdapat alasan-alasan bernas yang ditunjukkan untuk menyemak sesuatu keputusan dan dihujahkan bahawa oleh sebab ketidakadilan jelas berlaku, kelewatan tidak sepatutnya menghalang pelaksanaan bidang kuasa sedia ada. Penjelasan tersebut yang diberi untuk kelewatan tidak membentuk alasan munasabah. Oleh itu, ini bukan kes wajar untuk pelaksanaan bidang kuasa sedia ada mahkamah untuk menyemak dan mengetepikan keputusan panel kebenaran. Permohonan untuk semakan, oleh itu, gagal.

Case(s) referred to:

Adorna Properties Sdn Bhd v. Kobchai Sosothikul [2005] 1 CLJ 565 FC ***(refd)***

Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 6 CLJ 1 FC ***(refd)***

Badan Peguam Malaysia v. Kerajaan Malaysia [2009] 1 CLJ 833 FC ***(refd)***

Chan Yock Cher v. Chan Teong Peng [2005] 4 CLJ 29 FC ***(refd)***

Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Another Appeal [2013] 4 CLJ 901 FC ***(refd)***

Halaman Perdana Sdn Bhd & Ors v. Tasik Bayangan Sdn Bhd [2014] 3 CLJ 681 FC ***(refd)***

Lim Lek Yan v. Yayasan Melaka [2009] 4 CLJ 665 FC ***(refd)***

Semantan Estate (1952) Sdn Bhd v. Collector of Land Revenue Wilayah Persekutuan [1987] 2 CLJ 199; [1987] CLJ (Rep) 329 SC ***(refd)***

Semantan Estate (1952) Sdn Bhd v. The Government of Malaysia [1994] 3 CLJ 496 HC ***(refd)***

Semantan Estates (1952) Sdn Bhd v. Kerajaan Malaysia [2011] 2 CLJ 257 HC ***(refd)***

Terengganu Forest Products Sdn Bhd v. COSCO Container Lines Co Ltd & Anor And Other Application [2011] 1 CLJ 51 FC ***(refd)***

The Government of Malaysia v. Semantan Estates (1952) Sdn Bhd [2012] 1 LNS 635 CA ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 78(1), 96(a)
Public Authorities Protection Act 1948, s. 2(a)
Rules of the High Court 1980, O. 18 r. 19
Rules of the Federal Court 1995, r. 137

For the appellant - Mohamed Apandi Ali, Zauyah Be T Loth Khan, Amarjeet Singh Serjit Singh, Alice Loke Yee Ching & Zureen Elina Mohd Dom; SFCs
For the respondent - Cyrus Das, Ira Biswas, Janet Chai Pei Ying, Tan Hwee Yee & Carole Ngu; M/s Chooi & Co

[Editor's note: For the Court of Appeal judgment, please see The Government Of Malaysia v. Semantan Estates (1952) Sdn Bhd [2012] 1 LNS 635 (affirmed).]

Reported by S Barathi

JUDGMENT

Ahmad Maarop PCA:

Introduction

[1] This judgment is prepared pursuant to s. 78(1) of the Courts of Judicature Act 1964, as our learned brother, Justice Prasad Sandosham Abraham FCJ had since retired.

[2] For convenience, the parties will be referred to as they were in the High Court. The applicant will be referred to as the defendant and the respondent will be referred to as the plaintiff.

[3] The defendant filed notice of motion pursuant to r. 137 of the Rules of the Federal Court 1995 (r. 137) to review and set aside the decision of the Federal Court dated 21 November 2012 which dismissed the defendant's application for leave to appeal to the Federal Court. The defendant also applied for the following orders:

(i) the application for leave to appeal dated 18 June 2012 (the earlier application) be reheard;

(ii) stay of any proceeding pursuant to the decision of this court given on 12 December 2012; and

(iii) that costs shall be in the cause.

Background Facts

[4] This case has a rather long history consisting of events and a number of court actions which took place as far back as the year 1956. The plaintiff is a company incorporated in Malaysia having its registered office at 9th Floor, Bangkok Bank Building, Jalan Bandar, Kuala Lumpur.

[5] As at 19 July 1956, the plaintiff was the registered owner and in possession of the entire 700 acres 3 roods originally held under CT 12530.

[6] By a Gazette Notification No. 401 dated 19 July 1956 (GN 401/56), it was notified in the Selangor Government *Gazette* of 26 July 1956, that under s. 4(i) of the Land Acquisition Enactment (Cap 140) (the Enactment), an area of land measuring 225 acres from the land held under CT 12530 (the 225 acres) was likely to be needed for a public purpose, namely, a Diplomatic Enclave. This was followed by a Gazette Notification No. 557 dated 20 October 1956 (GN 577/56), where it was declared that under s. 6(i) of the Enactment, the 225 acres was needed for a public purpose, *to wit*, a Diplomatic Enclave.

[7] On 5 November 1956, the plaintiff received a notice dated 31 October 1956 (the notice) stating that the Government intended to take possession of the 225 acres under s. 9(i) and (iv) and 10(i) of the Enactment. The notice stated, *inter alia*, that all person who were interested in the 225 acres were to appear personally or by agent before the Collector on 20 November 1956 at 9.30am, at the office of the Collector at Kuala Lumpur to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interests and their objections, if any, to the measurements made under s. 8 of the Enactment.

[8] Although, GN 401/56 and GN 577/56 were in respect of only the 225 acres, at the hearing on 20 November 1956 before the Collector, the plaintiff was given a plan showing the areas to be acquired measuring 250 acres of land held under CT 12530 (the 250 acres). The plaintiff raised various objections, and at the plaintiff's request, the hearing was postponed to 27 November 1956.

[9] On 27 November 1956, at the hearing before the Collector, the plaintiff made a claim for compensation of RM13,000 per acre. At this hearing, the plaintiff's counsel delivered a letter to the Collector to the effect that the Anglo (Thai) Corporation Ltd of Singapore was an interested party in that it had an option to purchase 63 acres land held under CT 12530. The Collector made an award of compensation to the plaintiff at the rate of RM5,282 per acre for the 250 acres (the award) even though the area gazetted to be acquired was only the 225 acres.

[10] The total amount awarded to the plaintiff by the Collector under the award amounted to RM1,320,500. The written offer of the award of RM1,320,500 in respect of the 250 acres was dated 1 December 1956.

[11] On 3 December 1956, the Collector took possession of the 250 acres. Notice to that effect dated 3 December 1956 was given to the Registrar of Titles.

[12] By a letter dated 22 December 1956, the plaintiff informed the Collector that it received the award of the said RM1,320,500 under protest as to the sufficiency of the amount, and that the plaintiff would also be making an application to the Collector under s. 22 of the Enactment for a reference to the court.

[13] By a letter dated 10 January 1957, the plaintiff notified the Collector, *inter alia*, that they did not accept the award, and that they required the Collector to refer the matter to court under s. 22(1) of the Enactment.

[14] Then, by a Gazette Notification No. 61 dated 22 January 1958 (GN 61/58), the Selangor State Government declared the withdrawal of an area of land measuring 22 acres 1 rood 24 poles of CT 12530 (the 22 acres) from the acquisition *vide* GN 577/56 with effect from the date of the publication of the notice in the *Gazette*.

[15] Later, by Gazette Notification No. 117 dated 25 February 1958 (GN 117/58), it was declared that an area of land measuring 60 acres 2 roods 27.5 poles of CT 12530 (the 60 acres), was additionally needed for public purpose, namely, for extensions to the Diplomatic Enclave. Although GN 117/58 states that the 60 acres was part of the land held under CT 12530, by this time CT 12530 had been cancelled and two new titles, namely, CT 17037 and CT 17038, were issued. The 60 acres was part of CT 17038. Possession of the 60 acres was taken by the Collector without holding an enquiry or paying any compensation.

[16] By a letter dated 3 May 1958 from the Collector to the then solicitors for the plaintiff, Messrs. Shook Lin & Bok, the Collector admitted that:

(a) the award was invalid; and that

(b) the enquiry of 27 November 1956 as a whole was a nullity.

[17] By the same letter of 3 May 1958, the Collector informed the plaintiff's solicitors that notices under ss. 9(i), (iii), (iv) and 10(i) of the Enactment stating that the Government intended to take possession of 202 acres 2 roods and 16 poles of CT 12530 (the 202 acres), were given to the plaintiff, and the enquiry for the acquisition of the 202 acres was scheduled to be held on 18 June 1958. The 202 acres was by this time part of CT 17038. However, the enquiry was postponed to 15 August 1958, and was eventually abandoned on 24 March 1959.

[18] The area which the Government (through the Collector) finally took possession of from the plaintiff was the 263.272 acres.

[19] By a letter dated 1 August 1958 from Messrs. Shook Lin & Bok to the Attorney General, the latter was informed that the plaintiff agreed that all procedural matters be settled in the manner set out in the letter, provided the Government confirmed the agreement. By the letter dated 2 August 1958, Messrs. Shook Lin & Bok wrote to the Collector informing them that they have written to the Attorney General on the matter, and therefore the inquiries fixed by the Collector on 15 August 1958 (in respect of the 202 acres) will not have to be pursued. By the letter dated 5 January 1959 the State Legal Adviser replied to Messrs. Shook Lin & Bok confirming the arrangement set out in the latter's letter:

(a) The whole area now taken by the Government was acquired by virtue of GN 401/56.

(b) That areas "A", "C", and "D" shown in the plan referred to in letter no. 16 in file DOKL Conf. No. 52/57 dated 5 May 1958 were acquired under GN 401/56.

(c) That no proceedings were ever taken in respect of area "B".

(d) That the award made by the Collector in respect of areas "A", "C" and "D" was at the rate of RM5,282 per acre and that the plaintiff's claim in respect of the same area was at the rate of RM13,000 per acre.

(e) That the plaintiff is entitled to make an additional claim under ss. 29(i)(c) and/or (i)(d) of the Enactment in respect of severance and/or injurious affection.

(f) That the total area of "A", "B", "C" and "D" is the 263.272 acres.

(g) Further compensation at the rate of RM5,282 per acre is payable on the additional 13.272 acres plus interest at 6% would be paid from 3 December 1956.

(h) That the second acquisition proceedings would be withdrawn by the Government and should be treated by both sides as never having occurred.

[20] On 29 May 1959, a reference (Semantan 1) was made to the High Court *vide* Civil Application No. 2 of 1959 in respect of the purported acquisition of the 263.272 acres under s. 22 of the Enactment *vide* GN 401/56.

[21] On 21 September 1960, Ong J dismissed the action and held, *inter alia*, that the conditions in s. 22 of the Enactment must be complied with before the Collector can make the reference and the court have jurisdiction to act on it. In delivering his judgment, Ong J stated as follows:

> Mr. Ramani, Counsel for the **Collector of Land Revenue, ie, the Government, as respondent,** has raised a preliminary objection to my proceeding to hear this reference, on the ground that the Collector, in making his award, had omitted to carry out his statutory duty and to make an apportionment of compensation in favour of a known interested party in accordance with paragraph (c) of section 11(1) of the Land Acquisition Enactment. He submits that the effect of such omission is to invalidate that award, and that, in the absence of a valid award, this Court has no jurisdiction to act on a reference.
>
> Mr. Rintoul, for the applicant, contends first, that, so far as the parties to this reference are concerned – and having regard to the provisions of section 27 of the Enactment – the requisites for a valid award under section 11 had been complied with; secondly, that the omission was only an irregularity that did not vitiate the award; thirdly, that the Collector cannot be heard to ask the Court to go behind his award when he relies on his own default; and fourthly, that the parties, by their respective legal advisers, had agreed to waive all irregularities and ask for a reference.
>
> …

A reference to Court in the matter of land acquisition is governed by the Land Acquisition Enactment (Cap. 140), and its jurisdiction to entertain the reference is a jurisdiction resting solely on that statute. **The conditions prescribed by s. 22 must be complied with before the Collector can make the reference and the Court have jurisdiction to act on it.** As Chandavarkar J said in *In re Land Acquisition Act, Government v. Nanu Kothare & Ors.* ILR 30 Bom. 275, 285:

> These are the conditions prescribed by the Act for the right of the party to a reference by the Collector to come into existence. They are the conditions to which the power of the Collector to make the reference is subject. They are also the conditions which must be fulfilled before the Court can have jurisdiction to entertain the reference.

In the next place, a reference to Court postulates a valid award, that is to say, an award properly made in substantial conformity with the relevant provisions of the Enactment, which is section 11.

Mr Ramani attacks the award on the ground that the Collector's failure to make an apportionment in favour of the option – holders of a 63 – acre portion of the land acquired was a fatal defect. It may very well be so, or it may be that the omission was nothing more than an irregularity as Mr. Rintoul contends. I do not, however, consider it necessary to decide this point because **it is quite clear to me that on other grounds I do not have jurisdiction to proceed in the matter.**

The Notification under s. 4(i) was signed on July 19, 1956 and appeared as notice No. 401 in the Selangor Government Gazette of July 26, 1956. The declaration under section 6(i) was signed on October 20, 1956 and appeared in the Gazette as notice No. 577 on October 25, 1956. An award was made, under section 11, by the Collector on November 27, 1956. The applicants did not accept this award and on June 10, 1957 made a written application to the Collector stating their objections and requesting a reference to Court under section 22.

Subsequently a notice of withdrawal from acquisition under section 49 was given by Government on January 22, 1958 in respect of 22 Acres 1 Rood 24 Poles; but by Notification No. 117 of March 6, 1958 a further acquisition was made of 60 Acres 2 Roods 27.5 Poles, with the result that the area finally acquired was 263.272 acres.

On May 3, 1958 the Collector wrote to the applicant's solicitors as follows:

> Cub: Diplomatic Enclave - CT 12530 Lot 4647 - Mukim of Batu.
>
> Ref: YPH/6161/D 6355 of 17.5.1957.
>
> I have the honour to refer to your abovementioned letter and to inform you that when preparing Reference papers for this case certain irregularities came to light and I am advised that the Award made by the Collector on 27 November 1956 was invalid and that

A the enquiry as a whole was a nullity. I am further advised that I should now proceed on the basis that the area marked "A" on the attached plan has been validly gazetted and that the acquisition proceedings should continue from the stage at which the Mentri Besar issued a direction under section 7 of the Land Acquisition Enactment.

B 2. You have received a notice of withdrawal under section 49 of the Enactment in respect of area "B". Declarations under section 6 of the Enactment in respect of Areas "C" and "D" were published in the Selangor Gazette *vide* Notification 117 dated 6.3.58.

C 3. Attached to this letter are Copies of Notices under section 9(i), 9(iii), 9(iv) and 10(i) of the Enactment which are being served on the Registered Proprietor. Both enquiries have been fixed for the same day (the first at 9.30 a.m. and second at 2.30 p.m.) since the lands affected are adjacent to one another. If you would prefer the enquiries to be held on separate days, it will be appreciated if you D let me know and I shall be glad to adjourn the second enquiry to some other date.

On January 5, 1959 the State Legal Adviser wrote to the applicant's solicitors the following letter:

E Diplomatic Enclave

CT No. 12530 Lot 4647 - Mukim of Batu.

I have the honour to refer to your letter dated 1st August, 1958, on the above subject and in reply to inform you that I confirm the arrangements set out in your abovesaid letter namely:

F (a) The whole area now taken by Government was acquired by virtue of Notification No. 401 published in the Selangor Government Gazette on 26th July, 1956.

(b) That areas "A", "C" and "D" shown in the plan referred to in letter No. 16 in DOKL Conf. No. 52/57 dated 6th May, 1958 G were acquired under GN 401.

(c) That no proceedings were ever taken in respect of area "B".

(d) That the award made by the Collector of Land Revenue was at the rate of $5,282 per acre and that your client's claim in respect of the area was at the rate of $13,000 per acre. H

(e) That your client may make an additional claim under Section 29(i)(c) and/or (i)(d) of the Enactment in respect of severance and/or injurious affection.

(f) That compensation at the rate of $5,282 per acre had been paid on the 19th day of 25 December, 1956 in respect of 250 acres. I

(g) That the total area of "A", "C" and "D" is 263.272 acres.

(h) That your client will be paid further compensation at the rate of $5,282 per acre on the additional 13.272 acres plus 6% interest from the 3rd December, 1956.

(i) That the Second acquisition proceedings would be withdrawn by Government and treated by both sides as never having occurred.

2. I have spoken to the Attorney-General and he agreed with the above arrangement.

From the record prepared by the Collector and, in particular, the two letters quoted above, *it is clear that the Collector, upon taking legal advice, realised that he could not proceed to make a reference to Court on the basis of the award of November 27, 1956 which, according to such advice, was invalid.* Thereafter it was sought to solve the problem by agreement to the effect that the whole area finally acquired by Government was to be deemed to have been acquired by virtue of the Notification No. 401 of July 26,1956, and that the award by the Collector in respect of such area was at the rate of $5,282 per acre, as against a claim of $13,000 per acre by the applicants.

The additional acquisition under Notification 117 of March 6, 1958 cannot possibly be included in the award of November 27, 1956, or in the reference, as has been done. No award has ever been made in respect of this additional area. The only way it could have been included in that award was under the provisions of section 51, which was in the circumstances impossible.

I therefore hold that I have no jurisdiction under the Enactment to entertain the reference because it is not, in fact, a reference based upon the award of November 27, 1956, or any award. The Court has jurisdiction only under section 22. The parties themselves cannot, by an agreement to waive irregularities in procedure and to seek a reference, confer jurisdiction on the Court dehors the Enactment. Only Parliament can do so. Since this reference is expressly made under section 22 of the Enactment, there is only one proper course open to me, and I must decline to act.

I am fortified in my decision by the fact that it is in the best interests of all parties, and cannot but effect a considerable saving in time and costs.

The matter has reached this stage entirely by reason of the respondent's fault. The proper steps which should have been taken have not been taken. The remedy lay with him. I do not consider the applicant or his legal adviser are in any way to blame. In all the circumstances the appropriate order as to costs will be that the respondent pay the applicant costs of these proceedings.

I direct that the Assessors be paid $100 each under section 35, for the loss of their time … (emphasis added)

[22] Subsequent to Semantan No. 1, by way of letter dated 27 February 1961 from Messrs. Shook Lin & Bok to Messrs. Braddell & Ramani, solicitors for the Collector, the plaintiff required the Collector to make an award in respect of proceedings initiated under GN 401/56 in respect of the

A 202 acres, alternatively if the Collector maintained that he had made a valid award, to make a reference to the High Court under s. 22(i) of the Enactment pursuant to the plaintiff's solicitor's letter of 10 January 1957. The plaintiff also required the Collector to make an award in respect of the proceedings initiated under GN 117/58 in respect of the 60 acres.

B **[23]** By letter dated 14 March 1961 from the Collector's solicitors to Messrs. Shook Lin & Bok, the Collector claimed, *inter alia*, that it was not competent for the Collector to take the steps required of him by the plaintiff so long as his award remained. The Collector also stated that the only award of the Collector that existed was the award relating to the 250 acres, that the C plaintiff had received compensation for the 263.272 acres and that the only reservation made by the plaintiff was as to the amount ie, the rate per acre. The Collector also stated that should the plaintiff wish to apply to the Collector that the matter be referred to the court, they should obtain the necessary leave to enlarge the time prescribed to do so under s. 22 (iv) of the D Enactment.

[24] By letter dated 25 April 1961, the plaintiff informed the Collector that it was in the midst of preparing the final draft of an application under s. 44 of the Specific Relief Ordinance as indicated in the plaintiff's letter of 27 February 1961.

E **[25]** On 18 February 1963, the Ruler-in-Council granted the 263.272 acres to the Federal Lands Commissioner, 38 separate titles were issued and on 20 February 1963, the Registrar of Titles purported to register the grants in the name of the Federal Lands Commissioner pursuant to s. 56 of the Land Code (Cap 138). By this time, the 263.272 acres had become part of the land F held under CT 17038.

[26] Then, the plaintiff, by an *ex parte* Originating Motion No. A 24 of 1983 dated 9 August 1983 applied to the High Court for leave to apply for an order of *mandamus* directed at the Collector of Land Revenue Wilayah Persekutuan requiring him to complete the acquisition proceedings in G accordance with the provisions of the Acquisition Act by holding an enquiry and determining the amount of compensation to be paid to the plaintiff in respect of the acquisition of the 263.272 acres. On 8 December 1983, Wan Hamzah Mohd Salleh J granted leave to the plaintiff. Pursuant thereto, the plaintiff by notice of Originating Motion No. A 49 of 1983 (Semantan 2) H applied for an order of *mandamus*.

[27] By summons in chambers dated 12 October 1984, the defendant applied to strike out the plaintiff's Originating Motion No. A 49 of 1983 on various grounds.

I

[28] On 9 May 1985, Harun Hashim J ordered that the Originating Motion No. A 49 of 1983 be struck out on the ground that the action was barred by s. 2(a) of the Public Authorities Protection Act 1948.

[29] Aggrieved, on 28 February 1986 the plaintiff appealed to the Supreme Court *vide* Civil Appeal No. 195 of 1985. On 4 April 1987, the Supreme Court dismissed the plaintiff's appeal. The Supreme Court held, *inter alia*, that:

(a) An application for an order of *mandamus* is a "suit, action or proceeding" within the meaning of s. 2(a) of the Public Authorities Protection Act 1948 and therefore the application for an order of *mandamus* was time barred in this case.

(b) *Mandamus* will not be issued where there is an alternative remedy available. The plaintiff had an alternative remedy available to it, ie, an appeal from decision of Ong J in Semantan No. 1 and therefore could not apply for an order of *mandamus* when there was such alternative remedy available to it.

[30] The full judgment of the Supreme Court was reported in *Semantan Estate (1952) Sdn Bhd v. Collector of Land Revenue Wilayah Persekutuan* [1987] 2 CLJ 199; [1987] CLJ (Rep) 329; [1987] 2 MLJ 346.

[31] Thereafter, the Land Administrator wrote a letter dated 15 February 1989 to the plaintiff enclosing Borang L dated 18 November 1975 to surrender the title deed to the land held under CT 17038.

[32] On 2 March 1989, the plaintiff filed writ of summons in the High Court *vide* Kod No. D4-21.4.89 (Semantan 3) against the defendant for trespass. The plaintiff prayed for the following reliefs:

(1) a declaration that the plaintiff retained its beneficial interest in the 263.272 acres of the said Land of which the defendant has through its servants and/or agents taken unlawful possession of and that the plaintiff is entitled as against the defendant to possession thereof;

(2) mesne profits as damages for trespass;

(3) costs; and

(4) any other or further relief as this honorable court deems fit.

[33] On 10 August 1989, the defendant filed summons in chambers applying to strike out the plaintiff's action under O. 18 r. 19 of the Rules of the High Court 1980.

[34] In the meantime, the plaintiff by a letter dated 28 November 1989 from Messrs. Chooi & Company replied to the Land Administrator's earlier letter dated 15 February 1989 (referred to at para [31] of this judgment) stating that there was no proper acquisition and that in any event, the plaintiff did not have the requested title deed in its possession. Then, the Land Administrator by a letter dated 23 December 1989 informed the plaintiff that the said title deed had been cancelled and a new title deed issued.

[35] Back to Semantan 3, on 17 July 1991, Zakaria Mohd Yatim J allowed the defendant's application to strike out the plaintiff's action. The learned judge decided, *inter alia* that:

(a) The plaintiff was time barred from bringing this action under s. 2(a) of the Public Authorities Protection Act 1948.

(b) Since the award was not set aside, the defendant was still in lawful possession of the 263.272 acres of the land.

(c) The plaintiff was barred by the doctrine of *res judicata* from bringing this action.

(d) The action was an abuse of the process of court.

[36] The full judgment of Zakaria Mohd Yatim J is reported in *Semantan Estate (1952) Sdn Bhd v. The Government of Malaysia* [1994] 3 CLJ 496; [1994] MLJU 430.

[37] Dissatisfied with the aforesaid decision, on 6 August 1991 the plaintiff appealed to the Supreme Court *vide* Civil Appeal No. 01-32-1991.

[38] On 3 October 1994, the Federal Court allowed the plaintiff's appeal with costs and set aside Zakaria Yatim J's order made on 17 July 1991 (the 1994 Federal Court's decision).

[39] The 1994 Federal Court's decision revived the plaintiff's trespass action in Semantan 3. That trespass action which is the subject matter of the current review application is now known as Civil Suit S7-21-213-2003.

[40] In its statement of claim the plaintiff pleaded the following:

> 1. The plaintiff is a company incorporated in Malaysia having a registered office at 9th Floor, Bangkok Bank Building, Jalan Bandar, Kuala Lumpur.
>
> 2. The plaintiff was the registered owner and in possession of 700 acres of land held under Lot 4898 comprised in C.T. 17038 Mukim of Batu (formerly part of the land known as Lot No. 4647 comprised in C.T. 12530) which is hereinafter referred to as "the said Land".
>
> 3. On or about 3rd December, 1956 the defendant took possession of 250 acres of the said Land wrongfully and/or without any legal right to do so.

Particulars of Wrongful Possession

(a) The award made by **the Collector of Land Revenue Wilayah Persekutuan (hereinafter called "the Collector"), a servant and/or agent of the defendant on** 27th November, 1956 was invalid and *ultra vires* as it was based on a revised area of 250 acres and not on the area of 225 acres gazette under Government gazette of 25th October, 1956 appearing on Notice No. 577.

(b) The enquiry held on the 20th November, 1956 and adjourned to 27th November, 1956 at which the award stated in paragraph (3)(a) above was made was irregular and null and void for failure by the Collector to comply with the following sections of the Land Acquisition Enactment (cap. 40):

(i) Section 8, in that the Collector failed to cause the land subject to the acquisition to be marked out, measured and a plan made thereof,

(ii) Section 9(ii); in that the notice dated 31st October, 1956 was served on 5th November, 1956 was that served for an enquiry to be held on 20th November, 1956.

(iii) Section 11(i); in that the Collector failed to consider objections of interested parties to the measurements made under Section 8 and that the Collector failed to apportion the compensation among all the persons known or believed to be interested in the land.

(c) The Collector took possession of the 250 acres of the said Land on the 3rd December, 1956 wrongfully and/or without any legal right to do so.

4. On or about 22nd January, 1958 the State Secretary of Selangor, a servant and/or agent of the defendant gave a notice of withdrawal from acquisition over an area of land of 22 acres 1 rood 24 poles of the said Land.

5. By a notification No. 117 published in the *Gazette* on 6th March, 1958 the defendant proposed to acquire a further 60 acres 2 roods 27.5 poles of the said Land. Although the defendant had not conducted an enquiry or paid any award in respect of this 60 acres 2 roods 27.5 poles of the said Land, the defendant nevertheless took possession of the 60 acres 2 roods 27.5 poles of the said Land wrongfully and/or without any legal right to do so and has thereafter wrongfully remained in possession thereof.

6. On or about 3rd May, 1958 the Collector wrote to the plaintiff's then Solicitors, Messrs. Shook Lin & Bok to admit and state *inter alia* that the award made by the Collector on the 27th November, 1956 was invalid and that the enquiry as a whole was null and void.

7. By reason of the matters aforesaid the plaintiff has been deprived of the use and enjoyment of a total of 263.272 acres of the said Land and has thereby suffered loss and damage.

AND THE PLAINTIFF claims:

(i) A declaration that the plaintiff retained its beneficial interest in the 263.272 acres of **the said Land of which the defendant has through its servants and/or agents taken unlawful possession of** and that the plaintiff is entitled as against the defendant to possession thereof;

(ii) Mesne profits as damages for trespass;

(iii) Costs; and

(iv) Any other or further relief as this Honourable Court deems fit.

[41] The defendant applied to amend its earlier defence, deleting its then pleaded defence that the trespass action was time barred. On 21 October 2004, the High Court allowed the defendant's application to amend its defence. The defendant's amended defence dated 21 October 2004 essentially reads as follows:

Penyata Pembelaan Terpinda

1. Pihak Defendan tidak mempunyai pengetahuan mengenai perenggan 1 Penyataan Tuntutan.

2. Pihak Defendan menafikan perenggan 3 Penyataan Tuntutan dan butir-butir salah milikan.

3. Defendan menyatakan tanah seluas 263.272 ekar milik plaintif (selepas ini dirujuk sebagai "tanah tersebut") telah diambil alih oleh Kerajaan Negeri Selangor dengan sah dan plaintif telah membenarkan Kerajaan Negeri Selangor mengambil milik tanah tersebut pada 3.12.1956 dan menerima pampasan berjumlah RM1,320,500.00 pada 21.12.1956 dan RM79,241.01 pada 3.2.1959.

4. Defendan menafikan ada penglibatan dalam proses pengambilan tanah tersebut dan tiada pengetahuan mengenai perenggan 4, 5 dan 6 Penyataan Tuntutan. Selanjutnya defendan menyatakan bahawa plaintif telah mencadangkan melalui surat Peguamnya iaitu Tetuan Shook Lin & Bok bertarikh 1.4.1959 kepada peguam negara untuk mengabaikan segala kekurangan dan kesilapan dalam proses pengambilan tanah tersebut dan menganggap proses pengambilannya adalah mematuhi peraturan dan berkuatkuasa di sisi undang-undang berdasarkan terma-terma dalam surat berkenaan.

~~5.~~ (deleted)

5. Defendan juga menyatakan bahawa cadangan plaintif melalui surat tersebut telah dipersetujui oleh Penasihat Undang-Undang Negeri Selangor, oleh itu plaintif adalah terhalang dari mempertikaikan semula proses pengambilan yang telah disempurnakan itu.

~~6.~~ (deleted)

6. Defendan juga memplidkan bahawa plaintif bukan hanya telah mempersetujui akan cara proses pengambilan tanah tersebut yang telah dilaksanakan oleh Kerajaan Negeri Selangor, malah penyerahan-milik tanah tersebut dibuat oleh plaintif sendiri. Selanjutnya pada 18.2.1963 Ruler-In-Council Selangor telah menganugerahkan tanah tersebut kepada Pesuruhjaya Tanah Persekutuan melalui 38 hakmilik berasingan.

~~7.~~ (deleted)

7. Berdasarkan fakta-fakta tersebut di atas, defendan menegaskan bahawa Pesuruhjaya Tanah Persekutuan adalah pemilik sah tanah tersebut dan kenyataan plaintif di perenggan 7 Penyataan Tuntutan adalah dinafikan sekeras-kerasnya dan relif-relif yang dipohon pada perenggan (1), (2), (3) dan (4) adalah wajar ditolak sama sekali.

~~8.~~ (deleted)

8. Kecuali sebagaimana diakui dengan nyata terdahulu daripada ini, setiap dan tiap-tiap pengataan plaintif yang terkandung dalam Penyataan Tuntutan adalah dengan ini dinafikan, seolah-olah tiap-tiap pengataan diturunkan di sini secara *seriatim* dan disangkal satu persatu dengan khususnya.

9. Berdasarkan kepada fakta-fakta yang telah dinyatakan, defendan memohon Mahkamah yang mulia ini menolak tuntutan plaintif dengan kos.

[42] The matter was then heard and on 29 December 2009, the High Court allowed the plaintiff's claim and granted all the prayers prayed for by the plaintiff. The High Court held, *inter alia*, that the defendant had not taken the 263.272 acres of land from the plaintiff, lawfully. The full judgment is reported in *Semantan Estates (1952) Sdn Bhd v. Kerajaan Malaysia* [2011] 2 CLJ 257; [2010] MLJU 2174. In allowing the plaintiff's action, Zura Yahya JC stated as follows:

> [14] Plaintiff's stand in this action is that the taking of possession of the 263.272 acres by the Defendant from the Plaintiff is unlawful and wrongful since the Collector in relation to the 250 acres, had failed to comply with the relevant sections in the Enactment and for the 60 acres taken under GN 117/58 there was in fact never any enquiry under any written law. Defendant's view on this, as submitted by the learned Senior Federal Counsel is that the Plaintiff should not make it an issue since the acquisition of the land by the Government was made *vide* GN 401/56, and the letter dated 1 August 1958 by Messrs Shook Lin & Bok agreeing to settle all procedural matters and to proceed with regard to the quantum of compensation. It has also been pointed out that the Plaintiff had received the full amount of compensation awarded on 22 December 1956.

A [15] As regard to the letter dated 1 August 1958 by Messrs Shook Lin & Bok referred by the learned Senior Federal Counsel, I am of the view that it should not be considered just by itself. The State Legal Adviser had replied to it by his letter of 5 January 1959. Prior to this letter of 1 August 1958, it is not incorrect to say that there was the letter by the Collector dated 3 May 1958. This earlier letter and the reply letter by the State Legal B Adviser have to be considered together with the letter of 1 August 1958 so that the matter can be put in proper perspective.

[16] In the case of Semantan No. 1, Ong J had considered the letters dated 3 May 1958 and 5 January 1959 mentioned above. In the letter of 5 January 1959, reference was made to the letter of 1 August 1958. After C considering the mentioned letters Ong J stated that the parties sought to resolve the problem by agreement. He went on to state "The parties themselves cannot, by an agreement to waive irregularities in procedure and to seek a reference, confer jurisdiction on the Court, dehors the Enactment."

D [17] Further, *upon reading the two letters of 1 August 1958 and 1 May 1959 it can be concluded that they were written for the purpose of trying to resolve the problems.* It was more with the view of the Reference proceeding. It is not a case where there was a settlement agreement between the parties. *Thus Defendant cannot rely on these letters to say that the Plaintiff has agreed to waive irregularities and hence they (Defendant) can take the land unconditionally.*

E [18] As regard to the fact that the Plaintiff has accepted the compensation in 1956 it has in no way indicated that they are no longer pursuing their claim. *As stated by witness for the Plaintiff, ie, PW1 and also by the Defendant's sole witness, the compensation was accepted by the Plaintiff on protest.* There is also the evidence that after the decision in the case of Semantan No. 1, *the* F *Plaintiff had written to the Collector requesting him to make an award or alternatively to make reference to the High Court.* Plaintiff subsequently *filed an Originating Motion for an order of mandamus* directed at the Collector of Land Revenue, Wilayah Persekutuan requiring him to complete the acquisition proceeding by holding an enquiry and determining the amount of compensation to be paid in respect of the acquisition of the 263.272 acres. G *After failing to get an order of mandamus Plaintiff then filed the writ of summons* in this case. Besides the mentioned court proceedings, *Plaintiff have also adduced evidence that they continued to lodge their protest* when certain areas of their land under CT 17038 and also those which by then have been registered in the name of the Federal Land Commissioner, when declaration was published in the Selangor Government Gazette dated 5 H November 1964 and 21 September 1972 that the land was needed for the purpose of a through route from the diplomatic enclave to Batu village, and for a pump house, staff quarters and road. *All these refute the contention put forward by the Defendant that the Plaintiff have accepted the compensation awarded.*

I

[19] Going through the documentary evidence as can be seen in the Agreed Bundle of Documents (Part A) which has been marked 'A' it can be seen that *Collector failed to comply with several sections of the Enactment when taking possession of the 263.272 acres.* In relation to the 250 acres, *the Collector failed to comply with section 8 of the Enactment whereby he failed to cause the land subject to the acquisition to be marked out, measured and a plan made thereof.* This can be seen from the notes of the hearing on 20 November 1956 (page 3 of Bundle A) where the Plaintiff asked for a final plan. The presence of a plan is crucial since in the gazette notification stated an area of 225 acres would be taken but at the hearing the boundaries of the areas to be acquired showed it amounted to 250 acres. From the same notes of hearing, it can be seen that *the Collector had failed to comply with section 9(ii) which required that the hearing of the notice should not be earlier than 21 days of the publication of the notice.* What had happened then was that the notice dated 31 October 1956 was served on the Plaintiff on 5 November 1956 in respect of an enquiry to be held on 20 November 1956. *Further non-compliance by the Collector was in regard to section 11(i) whereby after being informed that Anglo (Thai) Corporation Ltd of Singapore was an interested party in that it had an option to purchase 63 acres of land held under CT 12530, he failed to apportion the compensation among all the persons known or believed to be interested in the land.*

[20] Although the Collector had withdrawn 22 acres from the land taken but then had added 60 acres to make the total area of land taken to be 263.272 acres. This 60 acres was supposedly taken under GN 117/58 but in fact there was never any enquiry held under any written law. Thus this is also done not in compliance with the Enactment.

[21] The other factor which the Plaintiff relied to show that the Defendant's possession of the land is unlawful is based on the Collector's letter mentioned earlier, ie, letter dated 3 May 1958. *In this letter the Collector had admitted that the award of 27 November 1956 (relating to the 250 acres) after which the Government took possession of the 250 acres was invalid.* And in the same *letter the Collector also admitted that the enquiry of 27 November 1956 pursuant to which the Award was made was a nullity.* Besides this letter of 3 May 1958, Plaintiff has also shown that for the 60 acres purportedly taken under GN 117/58, no enquiry under any written law was done. Due to this circumstances, parties attempted to resolve the issue by proceeding with the Reference in the manner they have confirmed in their respective letters of 1 August 1958 and 5 January 1959. During the hearing in the case of *Semantan No. 1*, t*he Collector again admitted that the Award was invalid and contained a fatal defect.* Thus going by what has been stated, *I am of the opinion that the Defendant is estopped from contending that the Award of the Collector is valid.*

…

A [26] With the Court's finding in the case of *Semantan No. 1* that it could not entertain the Reference because of what has transpired, the irregularities and the fact that there was no inquiry or award made in respect of the 60 acres under GN 117/58, the effect of it is that there is no valid award upon which the 263.272 acres was taken from the Plaintiff. That being so, by virtue of the doctrine of issue estoppel and *res judicata*, B the Defendant is not entitled in the present case to say that there has been an award made in respect of this 263.272 acres of land.

[27] Learned Senior Federal Counsel has submitted that there was no statement by the Plaintiff that they did not receive an award of RM1,320,500.00 and also an additional award and interest for a sum of C RM79,241.01. In the case of *Semantan No. 1* Plaintiff was not successful in their claim for the additional award but they had not file an appeal against it. Thus it was submitted that Plaintiff's claim in this case was for unjust enrichment for damages arising from trespass on the said land (Keuntungan berganda dari gantirugi terhadap pencerobohan ke atas tanah yang berkenaan). I am not persuaded by this submission. *In this case* D *it is clear that the compensation has been accepted by the Plaintiff under protest. It can be seen that the Plaintiff has at all time never agree that the amount accepted by them under protest was sufficient compensation.* With the finding of the Court in the case of *Semantan No. 1* that it cannot entertain the Reference, Plaintiff was then not able to challenge the adequacy of the compensation. And since *the award was not properly made in substantial* E *conformity with the relevant provisions of the Enactment (in relation to the 250 acres) and no enquiry or award made in respect of the other 60 acres, there is therefore no lawful acquisition of the 263.272 acres.* This has led to a claim for trespass where the Defendant has to pay damages. *Hence there is no unjust enrichment.*

[28] For the reasons adumbrated *above I find that the Defendant has not taken* F *the 263.272 acres of land from the Plaintiff lawfully and hence has remained in wrongful possession of the said land.* Hence Plaintiff's claim as prayed in paragraphs 1, 2 and 3 in the Statement of Claim is allowed. It is further ordered that mesne profits as damages be assessed by the Senior Assistant Registrar. (emphasis added)

G **[43]** Accordingly, Zura Yahya JC ordered as follows:

(i) The plaintiff retained its beneficial interest in the 263.272 20 acres of the land held under CT 17038 Mukim of Baru (formerly part of the land known as Lot 4647 comprised in CT 12530) of which the defendant has through its servants and/or agent taken unlawful possession of and that H the plaintiff is entitled as against the defendant to possession thereof;

(ii) That the defendant do pay the plaintiff mesne profits as damages for trespass, the said damages to be assessed by the Senior Assistant Registrar;

I (iii) That the defendant do pay the plaintiff costs in respect of liability forthwith. (As translated from the order dated 29 December 2009 which was in Bahasa Malaysia).

Proceedings In The Court Of Appeal

[44] Aggrieved with the decision made by Zura Yahya JC, the defendant then appealed to the Court of Appeal *vide* Civil Appeal No. W-01-61-2010.

[45] On 18 May 2012, the Court of Appeal dismissed the defendant's appeal with costs. The Court of Appeal held, *inter alia*, that the defendant had not acquired the land lawfully and hence was a trespasser. In delivering judgment of the Court of Appeal in this case (*The Government of Malaysia v. Semantan Estates (1952) Sdn Bhd* [2012] 1 LNS 635; [2012] MLJU 1747), Low Hop Bing JCA (sitting with Mohd Hishamuddin JCA and Linton Albert JCA) said:

> [24] Plaintiff's learned counsel Ms Ira Biswas (assisted by Ms Janet Chai Pei Ying) submitted that the acquisition of the Land by the Defendant from the Plaintiff is unlawful.
>
> [25] Learned Senior Federal Counsel Ms Suzana Atan (Ms Narkunavathy Sundareson with her) argued that the Plaintiff should not make the acquisition an issue since the acquisition was effected pursuant to GN 401/56. *Vide* letter dated 1 August 1958 issued by the Plaintiff's solicitors, parties had agreed to settle all procedural matters and to proceed with the quantum of compensation. The Plaintiff had on 22 December 1956 accepted the Award. They added that the Land had been lawfully acquired.
>
> [26] The Question for determination in the instant Appeal is whether the Defendant had lawfully acquired the Land?
>
> [27] An affirmative answer to this Question means that the Defendant was not a trespasser. Conversely, a negative answer renders the Defendant a trespasser.
>
> [28] The answer to this Question revolves around a discussion of the following issues:
>
> **(1) Conjunctive construction of letters;**
>
> **(2) Acceptance of compensation under protest;**
>
> **(3) Collector's non-compliance; and**
>
> **(4) Collector's admission of invalidity.**
>
> IV. CONJUNCTIVE CONSIDERATION OF LETTERS
>
> [29] In considering the above Question, we take the position that the letter dated 1 August 1958 issued by the Plaintiff's solicitors, and relied on by the learned Senior Federal Counsel, has to be read conjunctively with the Collector's letter dated 3 May 1958 and the State Legal Adviser's letter of 5 January 1959, so as to place the entire matter in proper perspective. Ong J had given a similar conjunctive consideration to the aforesaid letters in *Semantan No. 1 (supra)*. After considering these letters, pursuant to which the parties sought to resolve the problem by agreement, Ong J opined, at p. 302 I left, that:

A

> The parties themselves cannot, by an agreement to waive irregularities in procedure and to seek a reference, confer jurisdiction on the Court dehors the Enactment.

[30] In the instant Appeal, on a conjunctive consideration of the aforesaid letters, we find that they were written for the purpose of trying to resolve the problems brought about by the acquisition of the Land. It was not a settlement agreement between the parties. *The Defendant cannot rely on these letters to say that the Plaintiff has agreed to waive irregularities when Ong J had already held that the parties could not by themselves do so.*

B

V. ACCEPTANCE OF COMPENSATION UNDER PROTEST

C

[31] Next, *the Plaintiff's acceptance of the compensation in 1956 does not mean that the Plaintiff was no longer pursuing its claim, as the compensation was accepted by the Plaintiff under protest.* As alluded to the above and by way of recapitulation, the facts unfolded *the Plaintiff's continued and persistent protest.* This can be gleaned after the decision in *Semantan No. 1 (supra). The Plaintiff wrote to the Collector requesting him to make an award or alternatively to make reference to the High Court.* A series of law suits ensued. The Plaintiff subsequently filed an *Originating Motion for an order of mandamus* against the Collector but failed. *The Plaintiff then commenced the writ of summons* in the High Court which is now the subject 15 matter of the instant Appeal.

D

VI. COLLECTOR'S NON-COMPLIANCE

E

[32] There can be no doubt that *the Collector had not complied with s. 8 when he failed to cause the Land to be marked out, measured and a plan made thereof.* The Collector's notes of enquiry held on 20 November 1956 showed that the Plaintiff had asked for a final plan. This plan was crucial since the Gazette Notification stated that an area of 225 acres would be taken, but at the enquiry, the area acquired was 250 acres. The same notes of enquiry revealed that *the Collector had failed to comply with s. 9(ii) which required that the notice of the enquiry should not be earlier than 21 days of the publication of the notice.* The notice dated 31 October 1956 was served on the Plaintiff on 5 November 1956 in respect of an enquiry to be held on 20 November 1956 (ie, 15 days), plainly falling short of the prescribed 21 days. *The Collector has also not complied with s. 11(i), in that the Collector after being informed that Anglo (Thai) Corporation Ltd of Singapore was an interested party by virtue of an Option to Purchase 63 acres of the Land held under CT 12530,* the Collector had *failed to apportion the compensation among all the persons known or believed to be interested in the Land.*

F

G

H

[33] *The Collector had withdrawn 22 acres from the Land but added 60 acres 2 roods 27.5 poles, thus making the total area of acquired land to be 263.272 acres. The 60 acres 2 roods 27.5 poles was purportedly taken under GN 15 117/58, but no enquiry was ever held under any written law, and so not in compliance with the Enactment.*

I

VII. COLLECTOR'S ADMISSION OF INVALIDITY

[34] *The Collector had in his letter dated 3 May 1958 admitted that the Award (of 27 November 1956 for the 250 acres) and the acquisition were invalid, and that the enquiry of 27 November 1956, pursuant to which the Award was made, was a nullity*. At the hearing of *Semantan No. 1 (supra)*, the Collector again admitted that the Award was invalid and contained a fatal defect. *The Defendant is therefore estopped from contending that the Award is valid:* See *Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1953] 3 MLJ 331 FC.

[35] It is crucial to note Ong J's judgment in *Semantan No. 1 (supra),* that parties themselves cannot, by an agreement to waive irregularities in procedure and to seek a reference, confer jurisdiction on the Court dehors the Enactment. The irregularities were occasioned by the Collector. *The cumulative effect is that there is no valid award on the Land which the Defendant had acquired from the Plaintiff.* Ong J's judgment is binding on the parties, and so attracts the application of issue estoppel and *res judicata*: *Chong Kew v. Leow Lay & Ors* [2009] 1 CLJ 756; [2008] 6 MLJ 78 CA and *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189 FC.

VIII. CONCLUSION

[36] On the foregoing grounds, our answer to the above Question is in the negative. *We hold that Defendant had not acquired the Land from the Plaintiff lawfully, and hence was a trespasser.* We agree with and affirm the order made by the Court below. We dismiss this Appeal with costs of RM30,000. Deposit to the Plaintiff on account of the fixed costs.

[37] In assessing mesne profits, the learned Senior Assistant/Deputy Registrar has to bear in mind the salutary words of the (then) Supreme Court in *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15, reproduced below:

> It is axiomatic that a plaintiff seeking substantial damages has the burden of proving the amount of damages before he can recover.
>
> (emphasis added)

Proceedings In The Federal Court

[46] Dissatisfied with the decision of the Court of Appeal, the defendant thereafter filed an application to the Federal Court *vide* Civil Leave Application No. 08-478-06-2012 for leave to appeal against the decision of the Court of Appeal. In its affidavit in support of leave application, the defendant proposed the following questions of law:

(i) whether in the case where the ownership of land has been transferred to the Federal Lands Commissioner by a land acquisition process and compensation payment has been received, the original land proprietor has *locus standi* to challenge the status of the Federal Lands Commissioner on the land on the grounds that the Federal Lands Commissioner is a trespasser on the said land?;

(ii) whether in the case where the ownership of land has been transferred to the Federal Lands Commissioner by a land acquisition process and compensation payment has been received, the original land proprietor can still claim beneficial interest in the land on the grounds that the Federal Lands Commissioner is a trespasser on the said land?;

(iii) whether in the case where the ownership of land has been transferred to the Federal Lands Commissioner by a land acquisition process and compensation payment has been received, the original land proprietor is entitled in law to claim mesne profit?;

(iv) whether the original land proprietor is estopped from challenging the acquisition of land by the Government of Malaysia under the Land Acquisition Enactment Cap. 140 after the original land proprietor had failed to obtain an extension of time pursuant to the provisions of s. 22 of the Land Acquisition Enactment Cap. 140; and

(v) whether in the case where the ownership of land has been transferred to the Federal Lands Commissioner by a land acquisition process and compensation payment has been received, the original land proprietor may still dispute the validity of the acquisition of land on the grounds of failure to comply with the provisions of the Land Acquisition Enactment Cap. 140?

[47] The defendant then filed a second affidavit, affirmed on 22 October 2012, averring that after reading the written judgment of the Court of Appeal, it further sought the additional five questions of law:

(i) whether an invalid award of compensation will nullify the whole of the land acquisition process?;

(ii) whether an objection to the adequacy of the award of compensation can translate into a challenge of the land acquisition process?;

(iii) whether an award of compensation not properly made in substantial conformity of the Land Acquisition Enactment (Cap. 140) would render the land acquisition unlawful?;

(iv) whether a landowner who is no longer the registered owner of the land can claim for trespass and seek damages for mesne profit?; and

(v) whether the court can come to a finding that the Federal Lands Commissioner is in wrongful possession of the land and is a trespasser when the landowner has failed to set aside the irregular award of compensation?

[48] Then, the defendant in its written submission dated 22 October 2012 sought leave to raise a further two questions as follows:

(i) whether the respondent has a requisite *locus standi* to claim for trespass given that the land has been acquired and the title thereto been transferred to the Federal Lands Commissioner?; and

(ii) whether the respondent retains beneficial interest in the land given that the land has been acquired and title thereto been transferred to the Federal Lands Commissioner?

[49] The defendant's application for leave to appeal was heard on 21 November 2012 by a panel of five judges of the Federal Court comprising of Richard Malanjum CJSS (as His Lordship then was), Hashim Haji Yusof FCJ, Hasan Lah FCJ, Zainun Ali FCJ and Jeffrey Tan Kok Wha FCJ. In an unanimous decision the Federal Court dismissed the application with costs of RM10,000.

[50] Hence, this application by the defendant under r. 137, to review that decision of the Federal Court dated 21 November 2012.

The Decision Of This Court

[51] To exercise its inherent power under r. 137 to review its own decision, the court must be satisfied that it is a case that falls within the limited grounds and very exceptional circumstances. In *Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Another Appeal* [2013] 4 CLJ 901, Arifin Zakaria CJ adopting the relevant passage in Abdul Hamid CJ's judgment in *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1, said:

> [15] … this inherent jurisdiction must be exercised with circumspection in order to prevent any abuse of the same. We could not express this better than by adopting the words of Abdul Hamid CJ in *Asean Securities (supra)* which reads:
>
> > [4] In an application for a review by this court of its own decision, the court must be satisfied that it is a case that falls within the limited grounds and very exceptional circumstance in which a review may be made. Only if it does, that the court reviews its own earlier judgment. *Under no circumstances should the court position itself as if it were hearing an appeal and decide the case as such.* In other words, it is not for the court to consider *whether this court had earlier, in the same case, interpreted or applied the law correctly or not. That too is a matter of opinion.* An occasion that I can think of where this court may review its own judgment in the same case on question of law is where the court had applied a statutory provision that has been repealed. *I do not think that review power should be exercised even where the earlier panel had followed certain judgments and not the others or had overlooked the others. Not even where the earlier panel had disagreed with the court's earlier judgments.* If a party is dissatisfied with a judgment of this court that does not follow the court's own earlier judgments, the matter may be taken

upon another appeal in a similar case. That is what is usually called "revisiting". Certainly, it should not be taken up in the same case by way of review. That had been the practice of this court all these years and it should remain so. *Otherwise, there will be no end to litigation. A review may lead to another review and a further review.* This court has so many times warned against such attempts. See:

1. *Lye Thai Sang & Anor v. Faber Merlin (M) Sdn Bhd* [1985] 2 CLJ 423; [1985] CLJ (Rep) 196.
2. *Adorna Properties Sdn Bhd v. Kobchai Sosothikul* [2005] 1 CLJ 565.
3. *Allied Capital Sdn Bhd v. Mohd Latiff Shah Mohd. & Another Application* [2004] 4 CLJ 350, in particular the dissenting judgment of Abdul Hamid Mohamad, FCJ.
4. *Tai Chai Yu v. The Chief Registrar of the Federal Court* [1998] 2 CLJ 358.
5. *Chan Yock Cher v. Chan Teong Peng* [2005] 4 CLJ 29.
6. *Chu Tak Fai v. Public Prosecutor* [2006] 4 CLJ 931.

[5] Coming back to r. 137 of the RFC 1995, I have dealt at length on the effect of the rule in *Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor* [2008] 5 CLJ 1 and in *Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim* [2008] 5 CLJ 201. In the former case I concluded:

In other words, rule 137 cannot be construed as to confer any new jurisdiction to the existing jurisdiction of the Federal Court as spelt out under the Federal Constitution, the Courts of Judicature Act and other statutes.

[6] However, I accept that, in very limited and exceptional cases, this court does have the inherent jurisdiction to review its own decision. I must stress again that this jurisdiction is very limited in its scope and must not be abused ...

In short, in no circumstances whatsoever, this jurisdiction should be used as an avenue of further appeal. (emphasis added)

[52] In *Asean Security Paper Mills Sdn Bhd (supra)*, Zaki Tun Azmi PCA (later CJ) said:

[39] There is no doubt that this court has that authority to allow this application. Whether it does so, depends on the circumstances of each case. This court has on many previous occasions decided that it has the right to order a review of its own decision to prevent injustice or an abuse of the process of the court. It has that very wide discretion. However, that wide discretion will not be used liberally but only sparingly, in exceptional cases and on a case to case basis where a significant injustice had probably occurred and there was no alternative effective remedy. The court must exercise strong control over such application. It must be satisfied that it

is within exceptional category. Rule 137 cannot be construed as conferring unlimited power to review its earlier decision for whatever purpose. The court must not be too eager to invoke the rule.

[40] Some of the circumstances in which this discretion should be exercised or not, are as follows:

(a) That there was a lack of quorum eg, the court was not duly constituted as two of the three presiding judges had retired. (*Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [2001] 4 CLJ 61).

(b) The applicant had been denied the right to have his appeal heard on merits by the appellate court. (*Megat Najmuddin bin Dato Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd* [2002] 1 CLJ 645)

(c) Where the decision had been obtained by fraud or suppression of material evidence. (*MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577)

(d) Where the court making the decision was not properly constituted, was illegal or was lacking jurisdiction, but the lack of jurisdiction is not confined to the standing of the quorum that rendered the impugned decision. (*Allied Capital Sdn Bhd v. Mohd Latiff bin Shah Mohd and Another Application* [2004] 4 CLJ 350)

(e) Clear infringement of the law. (*Adorna Properties Sdn Bhd v. Kobchai Sosothikul* [2005] 1 CLJ 565)

(f) It does not apply where the findings of this court is questioned, whether in law or on the facts (since these are matters of opinion which this court may disagree with its earlier panel). (*Chan Yock Cher @ Chan Yock Kher v. Chan Teong Peng* [2005] 4 CLJ 29)

(g) Where an applicant under r. 137 has not been heard by this court and yet through no fault of his, an order was inadvertently made as if he had been heard. (*Raja Prithwi Chand v. Sukhraj Rai* [AIR] 1941)

(h) Where bias had been established. (*Taylor & Anor v. Lawrence & Anor* [2002] 2 All ER 353)

(i) Where it is demonstrated that the integrity of its earlier decision had been critically undermined eg, where the process had been corrupted and a wrong result might have been arrived at. (*Re Uddin* [2005] 3 All ER 550)

(j) Where the Federal Court allows an appeal which should have been consequentially dismissed because it accepted the concurrent findings of the High Court and Court of Appeal. (*Joceline Tan Poh Choo & Ors v. V. Muthusamy* [2007] 6 MLJ 485).

[53] The inherent power of this court under r. 137 cannot be invoked to review its own decision on its merits. In *Chan Yock Cher v. Chan Teong Peng* [2005] 4 CLJ 29 at p. 45, this court said:

A On the other hand, no leave to review should be given where the previous order is challenged on its merits, whether on facts or in law. Merely because the panel hearing the application is of the view that an important piece evidence had not been given sufficient weight or that the current panel disagrees with the interpretation or application of a certain provision of the law is not a sufficient reason for the court to set aside its previous B order.

The reasons have been amply stated by this court in *Adorna Properties Sdn. Bhd. (supra)* with which we fully agree. The only other reason we would like to add is that to freely allow previous orders to be reviewed would lead to "panel shopping". An unsuccessful party in an appeal may try its C luck before another panel that may disagree with the view of the earlier panel. If he is successful in having the order reversed, the other party will do the same thing again. Certainly, we would not like to see this apex court becoming a circus that repeats the same show again and again.

Coming back to the present application. It has been seen that the applicant D questions the findings of this court both in law and on facts. These are matters of opinion. Just because we may disagree (we do not say whether we agree or disagree with such findings) with the earlier panel of this court, that is not a ground that warrants us to review the decision. Similarly, regarding the interpretation and application of some provisions of the Companies Act 1965, even if we disagree with the earlier panel E (again we do not say whether we agree or disagree) that does not warrant us to set aside the judgment and the order of the earlier panel of this court and re-hear and review the appeal. Otherwise, as has been said, there would be no end to a proceeding.

[54] In *Badan Peguam Malaysia v. Kerajaan Malaysia* [2009] 1 CLJ 833, Zaki F Tun Azmi CJ said:

[11] … The applicant contends that the majority decision given on 27 December 2007 was in error and according to counsel that has resulted in a serious misinterpretation of the Federal Constitution that may affect future appointments of this nature to the Bench. Counsel for the applicant sought review, according to him, to prevent injustice. But what is justice? G I have attempted to discuss it in *Asean Security Papermills*. Is it injustice because the applicant does not agree with the decision of the court? If I understand him correctly, his contention is that there was injustice because according to him, there is a conflict in the decision in this case and the case of *All Malayan Estate Staff Union v. Rajasegaran & Ors* [2006] H 4 CLJ 195. That was a decision declaring that a person who has been called to the Bar but had not practised is not qualified to be an Industrial Court judge. It was based on the interpretation of s. 23A(1) of Industrial Relations Act 1967 (Act 177).

I

> [12] Before the application can succeed, he must be able to show on the face of the record that there was injustice. That error must be obvious on the face of the record. It should be able to be seen just by reading the record that there was an error which obviously was an injustice. In *Asean Security Papermills* case, I have listed out the circumstances where discretion under r. 137 can be exercised *supra* at p. 15. If one were to go through all these cases, injustice could be clearly seen even before going into the merits of each case. It cannot apply where a decision of this court is only questioned, whether in law or on the facts of the case. This principle is well spelt out in the case cited below.

[55] Explaining how the review application under r. 137 works, for example in relation to the ground of bias (which is one of the limited grounds on account of which a review application may be allowed), in *Halaman Perdana Sdn Bhd & Ors v. Tasik Bayangan Sdn Bhd* [2014] 3 CLJ 681; [2014] 4 MLJ 1, the Federal Court said:

> [26] Reverting to the motion the complaint is primarily based on bias, a ground in which some of the earlier applications under r. 137 succeeded. *But any allegation of bias must be related to the decisions in the leave application* and not the COA judgment. Simply put, to succeed in the motion *the applicants must show that the decisions, in particular the second decision in the leave application, was tainted with bias in the sense that when it was made there was actual or a real danger of bias.* (emphasis added)

[56] In his submission, the learned Attorney General (AG) said that they were seeking justice. When asked for the basis of his application for review, the learned AG said the basis was to do justice – to prevent injustice. He implored the court to allow the defendant to have its day in court so that there will be justice. He submitted that justice should not be sacrificed on the altar of finality.

[57] In *Asean Security Paper Mills Sdn Bhd (supra),* speaking of "justice", Zaki Tun Azmi PCA (later CJ) said:

> [44] Now, "justice" is a very wide and general term. Jurists through the years since Aristotle and Plato have tried to define justice and each has his own definition. It is not necessary for me to delve into that for the purpose of this judgment. *Any party who has lost a case will always claim that there has been injustice against him while the successful party will plead otherwise. In our system, the court's function is to hear and decide to the best of its ability, honestly, and after carefully considering all the evidence adduced before it, makes a decision. Based on its findings and applying the law as the judge understands, he arrives at his conclusion. That to my mind, in the context of this case, is justice. The decision may not be accepted by the unsuccessful party. But that is the best that an honest and an impartial judge can decide.*

A [45] *There must be a finality to deciding any dispute. It cannot be reviewed ad infinitum. It must end somewhere and in our system, it is the Federal Court. If there is any intention that r. 137 be read as conferring appellate jurisdiction, this court cannot also sit as an appellate court to hear appeals from itself.* (See art. 128 of the Federal Constitution and the decisions of the Federal Court in the cases of *Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor* [2008] 5 CLJ 1 and
B *Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim* [2008] 5 CLJ 201.

[46] Judges are mere mortals. They do not have ability to determine what had truly and actually taken place except to base their decision on legally admissible evidence adduced before them by the parties. The judges must arrive at a conclusion to the best of his ability. A judge who cannot make
C or delays his decision is not a good judge.

[58] The reasons upon which the application for review is based, are as stated in paras 18-20 of the supporting affidavit of the learned AG then.

[59] At para. 18, it is averred that the decision of this court on
D 21 November 2012 dismissing the application for leave to appeal had denied the defendant the opportunity to be heard in an appeal, and that this had resulted in gross injustice.

[60] At para. 19 of the supporting affidavit, it was averred that the Court of Appeal decision in *Semantan* had very serious legal implication on the
E process of land acquisition, the position of the defendant as the registered owner of land and its occupation of the same. The Court of Appeal's decision also had serious financial implication on the defendant.

[61] At para. 20 of the supporting affidavit, it is averred that in dismissing the defendant's application for leave to appeal, this court had denied the
F defendant the opportunity to be heard on the following issues:

(a) whether the defendant could be found to have remained in wrongful possession of the land which was registered in the name of the Federal Lands Commissioner in 1963;

G (b) the issue of unlawful acquisition was never raised by the plaintiff since GN577/56 and GN 117/58 until Semantan 3;

(c) at all material time, the sole complaint of the plaintiff was only on the amount of compensation paid for the land acquisition, and that the complaint was against the Collector;

H (d) after the decision in Semantan 1 in 1960, the remedy sought by the plaintiff was *mandamus* to compel the Collector to make an award for the acquisition, but since the remedy was applied for only in 1983, the application seeking for that remedy was dismissed by the court in Semantan 2 because it was barred by the Statute of Limitation;

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(e) the court's decision in Semantan 3 which found the defendant to have taken possession of the land unlawfully merely on account of action/omissions by the Collector was contrary to land acquisition law;

(f) misdirection by the Court of Appeal in Semantan 3 in holding that the defendant was a trespasser without differentiating the action of the Collector which acquired the land and the position of the defendant as the party which occupied the land;

(g) the court's decision on the non-compliance by the Collector (which the Collector and the defendant had agreed to waive since 1950) had caused the land acquisition, which was gazetted, to be invalid and the occupation by the defendant to be wrongful;

(h) the implication of the agreement between the Collector and the defendant regarding the acquisition and payment of compensation for the whole of 263 acres of the land; and

(i) the overall implication of the decision of the court on the principle of indefeasibility of title, and the limitation period to recover possession of land.

[62] At para. 21 of the supporting affidavit it is averred that the decision of the court that the defendant had taken possession of the land unlawfully had very serious financial implication on the defendant. In the proceeding for assessment of damages, the plaintiff is claiming for RM1,573,986,632 from 1957 to 2009.

[63] The learned AG submitted that the present case is an appropriate one to warrant this court to exercise its inherent jurisdiction to review its earlier decision. He submitted that the dismissal of the leave application by the earlier panel of this court mean that the defendant had no further recourse on merits of its case. He contended that the defendant had been denied a right to be heard as the defendant could not now have its appeal brought to the Federal Court.

[64] Learned counsel for the plaintiff submitted that the review application has no merit and should be dismissed with costs. According to him, significantly, there has been a four year delay between the decision and the review application. Further, apart from the fact of the significant delay and that the review application has no merit, it should be noted that, to date, a total of 12 judges have found in favour of the plaintiff in respect of the trespass action. Learned counsel submitted that it is obvious from the defendant's supporting affidavit that the defendant is in reality seeking to appeal the 2012 Federal Court's decision and re-argue the matter simply because it does not agree with the Federal Courts' findings. Under the legal principles established by this court, there are very limited circumstances in which the Federal Court can exercise the power under r. 137 to review and set aside its own decision.

[65] Learned counsel emphasised that an overriding principle recognised by the Federal Court in review cases is the need for finality on the ground that if a review is allowed for one, there is no reason why it should not be allowed for another. The principle was emphasised by Zaki Tun Azmi PCA (later CJ) in *Asean Security Paper Mills Sdn Bhd (supra)* at paras. 49-50 as follows:

> According to our system, it must be held that the Federal Court was right in arriving at its decision. There must be a finality ... There is no assurance that even if leave is given to review that decision of the Federal Court, the losing party will not claim injustice and seek for another review. Where does it then end?

[66] Learned counsel contended that on the facts, the defendant had not made out any circumstances which would allow the 2012 Federal Court decision to be reviewed under r. 137.

[67] Learned counsel also contended that by the review application, the defendant also sought to relitigate and challenge the following decisions of the court between the plaintiff and the defendant/its agents which it was bound by the doctrines of *res judicata* and issue estoppel:

(i) The decision of the High Court made on 21 September 1960 in Semantan No. 1 between the plaintiff and the Collector of Land Revenue; and

(ii) The decision of the Federal Court made on 3 October 1994 ("the 1994 Federal Court decision") in Supreme Court Civil Appeal No. 01-32-1991 between the defendant and the plaintiff in these proceedings when the defendant applied to strike out the trespass action but failed in the Federal Court.

[68] Replying to the averment in para. 18 of defendant's supporting affidavit, alleging that the Federal Court denied the defendant the opportunity to be heard in an appeal, learned counsel submitted that this cannot be a ground for review because the whole objective of the leave process was to determine if there should be an appeal against the decision of the Court of Appeal. It follows that the reason why the defendant was not given leave to appeal against the 2012 Court of Appeal decision was because it did not satisfy s. 96 of the Courts of Judicature Act 1964, and the judges of the Federal Court who heard the leave application unanimously dismissed it. Learned counsel submitted that the fact that the defendant failed in its fully argued leave application did not give the defendant grounds to file an application for review under r. 137. If the defendant's argument is accepted, it means that every time an application for leave to appeal to the Federal Court under s. 96 of the Courts of Judicature Act 1964 is dismissed, the losing party can apply for a review of the dismissal by using r. 137. This is clearly not the law and would open the floodgates for a review of every failed application under s. 96.

[69] In respect of paras. 19 and 21 of the defendant's supporting affidavit on the averment regarding serious legal and financial implications in the findings of the 2012 Court of Appeal decision, learned counsel for the plaintiff submitted as follows:

(a) It is obvious that there are legal and financial implications in the findings of the 2012 Court of Appeal decision as with any decision of the court. Had the plaintiff lost, it would also contend the implication is serious. However, the implications of a judgment cannot found a basis to review the final decision of the apex court. Therefore this alleged ground is unsustainable.

(b) Further, the legal and financial implications in the findings of the 2012 Court of Appeal decision are the natural consequence of the wrongful actions of the defendant.

(c) In any event, in putting forth the averment that the plaintiff claims RM1,573,986,632 as mesne profits until 2009, the defendant failed to inform this court that the defendant disputed that sum and instead alleged that the sum to be paid as mesne profits until 2011 should only be RM214,008,211.16. In any case, pursuant to the orders of the courts below in Semantan 3, there will be hearing on the assessment of damages claimed by the plaintiff. As observed by the Court of Appeal, the plaintiff has the burden of proving the amount of damages before it could recover.

[70] Replying to paras. 20(a) and (i) of the defendant's supporting affidavit (regarding whether the defendant could be found to have remained in wrongful possession of the land which was registered in the name of the Federal Lands Commissioner, and regarding the overall implication of the court decision on the principle of indefeasibility, and the limitation period to recover land), learned counsel submitted as follows:

(i) The defendant had every opportunity to and did defend the trespass action at every stage of the proceedings.

(ii) Clearly all 12 judges who found in favour of the plaintiff at all these stages found no merit in the defendant's position.

(iii) The fact that the land has been wrongly transferred into the name of the Federal Lands Commissioner does not mean that the defendant rightfully owns the land.

(iv) In any event, the defendant has already had its day in court on this point as it had pleaded in its defence that the subject land was in the Federal Lands Commissioner's name. The courts nevertheless decided in this matter that the defendant had wrongfully taken the land.

(v) The defendant had submitted in the Court of Appeal that if the land was unlawfully acquired, it would not have indefeasible title.

(vi) The courts have found that the land was unlawfully acquired and taken from the plaintiff.

(vii) The defendant again advanced this argument at the leave application in the Federal Court but failed.

[71] Replying to para. 20(b) of the defendant's supporting affidavit that the issue of unlawful acquisition was never raised by the plaintiff since GN 577/56, learned counsel submitted that the defendant had already lost this argument in the 1994 Federal Court decision when the defendant failed in its attempt to strike out the trespass action on, *inter alia* grounds of delay and limitation. It is an abuse for the defendant to seek to re-argue the point in the review application.

[72] With regard to the averment in paras. 20(c) and (h) of the defendant's supporting affidavit that the sole complaint of the plaintiff was only on the amount of compensation, and regarding the implication of the alleged agreement between the Collector and the plaintiff in respect of the acquisition and payment of compensation, learned counsel for the plaintiff submitted that the entire issue of the effect of the receipt under protest by the plaintiff of the award had been fully litigated and ventilated at all levels as can be seen from the written judgments of the High Court and the Court of Appeal. Again, it is an abuse for the defendant to raise and re-argue this point in the review application.

[73] In our view there is force in that submission. From the statement of claim, it is not correct to say that the sole complaint of the plaintiff was only the amount of compensation (which was received under protest). Possession of the land was also challenged as being wrongful, the particulars of which were pleaded which included reference to the inquiry of 27 November 1956 which was impugned as being irregular and null and void for non-compliance of the relevant provisions of the Land Acquisition Enactment. Also pleaded was the admission by the Collector on 3 May 1958, that the award of 27 November 1956 was invalid, and that the inquiry held thereon was null and void. It appears to us that all these were litigated and dealt with by the courts below in their judgments. The implication of the alleged agreement between the Collector and the plaintiff was also dealt with by the courts below. Upon considering the circumstances regarding the relevant letters exchanged between the plaintiff and the defendant, the Court of Appeal found that there was no settlement agreement between the parties. The Court of Appeal held that the defendant could not rely on those letters to say that the plaintiff agreed to waive irregularities.

[74] Replying to para. 20(d) of defendant's supporting affidavit, learned counsel submitted that the *mandamus* proceedings in 1983 are irrelevant to the trespass action.

[75] With regard to para. 20(e) of defendant's supporting affidavit, learned counsel submitted that the defendant has had every opportunity to argue its position on the (repealed) Enactment. This cannot be relitigated as and when the defendant feels it should be.

[76] We would also add that contrary to what was stated in para. 20(e), the court's decision in Semantan 3 that the defendant had taken possession of land unlawfully was not merely on account of action/omissions by the Collector, but also the implication of the apparent irregularities in the procedures in the acquisition resulting from the Collector's action/omissions as well as the admission by the Collector that the award of 27 November 1956 was invalid, and that the enquiry held was a nullity.

[77] With regard to para. 20(f) of defendant's supporting affidavit, learned counsel submitted that the defendant's attempt to distance itself from the Collector's actions are wholly without merit and inconsistent with its own position. The defendant is the trespasser, with titles issued in respect of the subject land in its name *via* the Federal Lands Commissioner (the person who holds the defendant's real property on the defendant's behalf). In any event, the defendant's submission is also wholly inconsistent with its own position and with the law in that:

(i) The defendant has itself admitted that the Collector is the servant and agent of the defendant as can be seen from its application and supporting affidavit to strike out the trespass action which resulted in the 1994 Federal Court decision, and in its submission in the application to strike out.

(ii) In the defendant's submissions in the trial of the trespass action in the High Court, the defendant submitted that the (purported) acquisition was by the Government (at that time Selangor).

(iii) In para. 9.4 of the defendant's affidavit in support of the earlier leave application affirmed by Aida Adhha binti Abu Bakar on 18 June 2012 ("applicant's leave affidavit"), the defendant itself had stated that the (purported) acquisition was by the Government of Malaysia under the Enactment.

[78] Regarding para. 20(g) of defendant's supporting affidavit, learned counsel submitted that the consequences of the judgment are the natural consequences of the defendant's wrongful actions. This cannot form the basis of an application for review under r. 137.

[79] Regarding para. 20(i) of defendant's supporting affidavit, learned counsel submitted that it is an abuse of process to raise the issue of limitation when this has been decided against the defendant by the 1994 Federal Court decision. The defendant is bound by the 1994 Federal Court decision under the doctrine of *res judicata* and issue estoppels.

[80] The issues raised by the defendant in para. 20 of the supporting affidavit were issues which properly belonged to Semantan 1, Semantan 2 and Semantan 3, and which had been raised, litigated and decided in those cases. In our view, none of the grounds raised by the defendant is sufficient to justify a review under r. 137.

[81] In this case, the review of the decision of the leave panel was not sought on any of the limited grounds and exceptional circumstances explained in *Asean Security Papers Mills Sdn Bhd (supra).* In submitting injustice as the ground of the defendant's application for review, the learned AG challenged the decision of the High Court and the decision of the Court of Appeal which he contended had caused blatant injustice. The thrust of his oral submission before us was that the acquisition exercise was never challenged on its legality, the compensation was received under protest and that the plaintiff kept the compensation money. He said that the grant of the titles was never challenged. He contended therefore that the decision of the High Court was manifestation of injustice. He prayed that the defendant be allowed to argue on the legal issues which arose from that decision. The legal issues are the questions which we have referred in paras. [46] to [48] of this judgment. It is true that the plaintiff had received the compensation under protest. However, it is not correct to say that the acquisition was never challenged on its legality. As we have said, the pleaded case of the plaintiff was that the defendant had taken possession of the land wrongfully on the grounds which included non-compliance by the Collector in the acquisition exercise, of the relevant provisions under the Land Acquisition Enactment and the admission by the Collector that the enquiry held and the award made therein were null and void. The facts and circumstances relating to these were raised, argued and dealt with by the courts in Semantan 3.

[82] It was contended on behalf of the defendant that because the leave panel did not grant leave, the defendant was deprived of the opportunity to have its appeal argued on merits in the Federal Court, and that the defendant had no other alternative remedy. We are unable to agree. The possible remedy for the defendant was to appeal to this court for which leave to appeal must be obtained under s. 96 of the Courts of Judicature Act 1964. That section provides:

Condition of appeal

96. Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court:

(a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or

(b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision.

[83] The jurisprudence relating to conditions of leave to appeal was explained in *Terengganu Forest Products Sdn Bhd v. COSCO Container Lines Co Ltd & Anor And Other Application* [2011] 1 CLJ 51; [2011] 1 MLJ 25. According to *Terengganu Forest*, the purpose of s. 96 is not to allow for correction of ordinary errors committed by the lower courts as would in an appeal as of right (see para. 22 of Zaki Azmi CJ's judgment). The defendant, as the applicant seeking leave to appeal has a heavy burden (see *Terengganu Forest*, para. 32). It had to fulfill the threshold requirement provided under s. 96. Then, there is the question of prospect of success. Even if the points of law framed by the defendant fall within the ambit of section, it has to show a *prima facie* case for success. This is demonstrated in *Lim Lek Yan v. Yayasan Melaka* [2009] 4 CLJ 665, which is also a case concerning an application for review of the decision of the Federal Court dismissing application for leave to appeal. In delivering the judgment of the Court, Arifin Zakaria CJ (Malaya) (later CJ) said:

[17] In the present case it would appear from the submission of counsel for the applicant that the court dismissed the application on the ground that even if the points of law posed by the applicant fall within the ambit of s. 96(a) the applicant was bound to fail in the appeal. In other words the applicant failed to show a *prima facie* case for success. On this issue, Augustine Paul FCJ in *Joceline Tan Poh Choo & Ors (supra)* said:

> The next matter for consideration is *whether the point if decided in favour of the intending appellant will show that there is a prima facie case for success in the appeal. This would depend on the issue to be raised in the appeal and, thus, on the nature and manner in which the question for appeal is framed. It must be so couched as to incorporate a point of law which has the effect of reversing findings made against the intending appellant without any further evaluation of the evidence. This in turn means that the answer given to the question must be such that it has the effect of reversing the*

A *judgment. It is only then that the question of success in the appeal can arise.* It must be remembered that the very object of making appeals to this court subject to leave is to prevent frivolous and needless appeals (see *Kredin Sdn Bhd v. OCBC Bank (Malaysia) Bhd* [1998] 2 CLJ 797). *Leave to appeal on a proposed question will therefore not be granted if there is no hope of success* (see *Beatrice AT Fernandez v. Sistem*
B *Penerbangan Malaysia & Anor* [2005] 2 CLJ 713).

Therefore, *what the court did in the present case was within its power or discretion. What it did was to consider the questions posed and then came to the conclusion that even if those questions were to fall within the ambit of s. 96(a) there is no chance of success by the applicant in the appeal proper.* This is also in line with the
C decision of this court in *Beatrice AT Fernandez v. Sistem Penerbangan Malaysia & Anor (supra).* (emphasis added)

[84] The defendant prayed that the decision of the leave panel refusing to give leave be set aside and that the application for leave dated 18 June 2012 be reheard so that the questions of law framed could be argued. The questions
D of laws are the questions referred to in paras. [46] to [48] of this judgment. All these questions were argued before the leave panel which eventually, by a unanimous decision, dismissed the application.

[85] That was a decision dismissing the application under s. 96 of the Courts of Judicature Act 1964 for leave to appeal to the Federal Court. The
E leave panel of the Federal Court must have decided that the judgment or order of the Court of Appeal made in Semantan 3 did not involve a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage. In other words, the defendant failed to fulfill the
F threshold requirement under s. 96(a) of the Courts of Judicature Act 1964. Rule 137 cannot be used as a further avenue of appeal. We cannot consider the order of the leave panel as though we are sitting in judgment in an appeal from that decision. It is not for us to consider whether the leave panel had interpreted or applied the law correctly or not. That is a matter of opinion
G (see *Asean Security Paper Mills Sdn Bhd (supra)*). No leave should be given where the leave panel's decision is challenged on its merits, whether on facts or in law. Even if we are of the view that an important piece of evidence had not been given sufficient weight, or even if we do not agree with the interpretation or application of certain provision of the law, there is no
H sufficient reason for us to set aside the decision of the leave panel. Just because we may disagree with the leave panel (we do not say whether we agree or disagree with its decision), that is not a ground to warrant us to review the decision. Otherwise, there would be no end to a proceeding (see *Chan Yock Cher (supra)*). Furthermore, in this case there is nothing shown by the defendant that it has a *prima facie* chance of success.

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[86] We must be satisfied that the decision falls within the limited grounds and very exceptional circumstances as explained in *Asean Security Paper Mills Sdn Bhd (supra)* (see para. 52 of this judgment) and other cases such as coram failure, bias, where the decision has been obtained by fraud or suppression of material evidence, clear infringement of the law, or other established categories. None of these grounds applies in this case.

[87] Having considered all the circumstances in this case, we conclude that this is not an appropriate case for us to exercise our inherent power to review and set aside the decision of the leave panel. The application for review therefore fails.

[88] In addition, the plaintiff has also raised the issue of the defendant's delay in filing this application. Learned counsel for the plaintiff submitted that the defendant filed the review application on 28 November 2016 which was more than four years after the leave panel made its decision on 21 November 2012. According to the learned counsel, this inordinate delay is inexcusable and this alone should result in the dismissal of the review application.

[89] In para. 22 of his supporting affidavit, the learned AG explained the reason for the delay:

> Saya sesungguhnya menyatakan bahawa kes ini telah dibawa ke perhatian saya setelah memegang jawatan Peguam Negara Malaysia mulai 27.7.2015. Setelah meneliti segala suratcara dan menimbang latar belakang kes ini dan implikasi keputusan tersebut kepada Pemohon, saya berpandangan keputusan Mahkamah Persekutuan harus disemak untuk membetulkan suatu ketidakadilan ketara yang telah diakibatkan (correct a blatant injustice that has resulted).

[90] The learned AG submitted that where there were cogent reasons demonstrated for a review of a decision, the issue of delay would be insignificant. The residual jurisdiction of this court to review its earlier decision is to prevent injustice. He argued that since a blatant injustice has been caused, the delay ought not to hinder the exercise of the inherent jurisdiction.

[91] We agree with the plaintiff that the explanation given on behalf of the defendant for the delay does not constitute an acceptable reason for the delay. In this regard, we refer to the decision of this court in *Adorna Properties Sdn Bhd v. Kobchai Sosothikul* [2005] 1 CLJ 565, where PS Gill FCJ delivering the judgment of the court said:

A Fourthly, there is also the element of delay on the part of the applicant. The first application was made in 2001 and after its disposal there was a lapse of almost 18 months before the present application was filed on 12 July 2002. Thus not only the grounds were submitted by way of instalment, there was delay as well. We do not think this court should condone, let alone encourage, such an attitude. A court of law is duty-
B bound to ensure that the interests of all parties appearing before it are equally safeguarded. Public interest expects it. And it would be highly undesirable and prejudicial to a successful litigant to be kept in limbo while the unsuccessful party ponders as to his next course of action.

[92] In the result, the application is dismissed with costs.

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